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In the Supreme Court of the United States
October Term, 1993

Heartland Federal Savings and Loan Association,

Petitioner,

vs.

Briscoe Enterprises, Ltd., II,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Appendix to
Petition for Writ of Certiorari

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No. 92-1446

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re: Briscoe Enterprises, Ltd., II,
d/b/a Regalridge Apartments,

Debtor.

Heartland Federal Savings & Loan Association,

Appellee,

vs.

Briscoe Enterprises, Ltd., II,
d/b/a Regalridge Apartments,

Appellant.

July 13, 1993

Before Wisdom and Duhe, Circuit Judges, and Doherty,* District Judge.

*District Judge of the Western District of Louisiana, sitting by designation.

Wisdom, Circuit Judge:

This bankruptcy case requires the Court to confront some very difficult problems associated with a Chapter 11 "cramdown" reorganization.[1] We agree with the Bankruptcy court's approval of the reorganization plan; we REVERSE the District Court.

I.

The debtor, Briscoe Enterprises, Ltd., II, is a Texas limited partnership formed to develop a 784-unit apartment complex in a depressed section of Fort Worth. It is a low-to-moderate-income community, and about 25% of the residents received rental assistance from either the federal government or the City of Fort Worth. This complex, known as the Regalridge Square Apartments, was the sole asset of the limited partnership. Construction was in two phases. It was completed in early 1985. Financing was non-recourse and was from two sources: the predecessor of Heartland Federal Savings and Loan

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[1]"The cramdown provision allows a [reorganization] plan to be confirmed even if the necessary consents of each class [of creditors] are not obtained. The policy is that the public good is served by rehabilitations and a law that prevents creditors from getting immediate satisfaction but gives the creditor as much as the creditor could get upon liquidation and compensates him or her for the delay is proper to force upon creditors." 3 Daniel R. Cowans et al., *Cowans Bankruptcy Law and Practice* § 20.26 at 419 (1989 edition).

Association and the city of Fort Worth.[2] Heartland lent Briscoe $18.7 million. The city which had a lien junior to that of Heartland lent $7 million.

When the free-wheeling real estate ride of the mid-eighties ground to a halt, Briscoe began to miss its interest payments. Briscoe failed to make interest payments for the last three months of 1988 and entirely ceased servicing its debt to Heartland in July 1989. On December 29, 1989, Briscoe sought relief under 11 U.S.C. § 1101 et seq. (Chapter 11). Briscoe filed its first amended plan of reorganization on November 16, 1990 and its fourth on January 22, 1991. The fourth plan is the subject of this case.

On January 23, 1991, the bankruptcy court began hearings to consider the confirmation of the plan. The bankruptcy court held four days of hearings in January and one day in March. Eight witnesses appeared. The court, with counsel present, personally inspected the property. During these hearings, the bankruptcy court assigned a value to the property of $8.2 million. This was classified as a secured claim for Heartland. Heartland's remaining $10 million[3] and the city's $7 million became unsecured claims. Heartland objected, so that for the reorganization plan to be confirmed, it would have to pass the cramdown requirements of § 1129(b). The bankruptcy judge confirmed the plan on April 23, 1991.

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[2]The language of this opinion will treat Heartland as if it had made the initial loan.

[3]The bankruptcy court described Heartland's unsecured deficiency claim as "approximately $10 million".

Heartland appealed to the district court. The district court, without oral argument but in a lengthy opinion, reversed the bankruptcy court's confirmation on April 14, 1992.[4] Briscoe then appealed to this Court.

II.

The plan divides the claims and interests into six classes:

> "Class 1 consists of Allowed Administrative Claims.
> Class 2 consists of Allowed Priority Claims.
> Class 3 consists of the Allowed City Claim.
> Class 4 consists of the Allowed Heartland Claim.
> Class 5 consists of all Allowed Unsecured Claims asserted against the Debtor.
> Class 6 consists of holders of Interests in the Debtor."

The property is to be placed in a trust managed by three trustees. Heartland, the city, and the Fort Worth NAACP will each nominate a trustee. Heartland's claim was divided into a secured and an unsecured portion. The secured portion is to be paid in monthly installments of principal and interest as though amortized over thirty years with interest at a rate of 10.25%, the rate of interest in the loan. The secured claim is to be paid in full upon the sale

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[4] *In re Briscoe Enterprises Ltd., II*, 138 B.R. 795 (N.D. Tex. 1992).

of the property or the expiration of fifteen years, whichever shall first occur. At the end of fifteen years, 20% of the principal would be paid down. Heartland's unsecured claim is accorded the same treatment as the city's unsecured claim and the class 5 general unsecured creditors. These unsecured creditors are to receive periodic cash payments if net cash flow allows and the trustees determine that excess cash need not be reserved for any other purpose. The unsecured creditors would also benefit pro rata from any sale or refinancing of the property if there is an excess over Heartland's secured claim. The holders of class 6 interests will receive nothing and their interests are cancelled.[5]

III.

[1] The bankruptcy appellate process makes this Court the second level of appellate review. This Court, however, performs the identical task as the district court. We review the bankruptcy court's findings of fact under the clearly erroneous standard and its conclusions of law de novo.[6] We do benefit from the district court's thoughts on the matter, but as Judge Frank Johnson wrote for the Eleventh Circuit: "The amount of persuasive weight, if any, to be accorded the district court's conclusion . . . is entirely subject to our discretion."[7]

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[5]This appears to fulfill the requirements of § 1123(a)(3).

[6]*Matter of Bennett*, 970 F.2d 138, 139 (5th Cir. 1992).

[7]*In re Sublett*, 895 F.2d 1381, 1384 n.5 (11th Cir. 1990).

IV.[5]

A. *The Debtor's Standard of Proof.*

The first question that we need to resolve is the debtor's standard of proof in proving that the reorganization is confirmable under § 1129(a) and whether the fact that this is a § 1129(b) cramdown affects the standard.

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[5]Professor Elizabeth Warren was consulted as an outside expert in compliance with (A)(4) of Canon 3 of the Code of Judicial Conduct for United States Judges which in pertinent part provides: "A judge may obtain the advice of a disinterested expert on the law applicable to the proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." Justice Roger Traynor ended an article on appellate judging with the comment that: "There is no reason why courts should not request in complicated cases the disinterested expert opinion of scholars . . . We might well develop a tradition of regarding such public service as one of the most honorable responsibilities of the profession." Roger J. Traynor, *Badlands In An Appellate Judge's Realm of Reason*, 7 Utah L. Rev. 157, 170 (1960). Professor Warren is the Warren A. Schnader Professor of Commercial Law at the University of Pennsylvania and Robert Braucher Visiting Professor of Law at Harvard. She is the co-author (with Prof. Westbrook) of *The Law of Debtors and Creditors* (Little Brown 2nd ed. 1992) and is preparing a handbook for the Federal Judicial Center on Business Bankruptcy.

[2] The two options are proof by a preponderance of the evidence or by clear and convincing evidence. "Preponderance" means that it is more likely than not.[9] "Clear and convincing" is a higher standard and requires a high probability of success.[10]

A number of bankruptcy courts have used the clear and convincing standard in a cramdown, but in none of the cases have we found a satisfactory explanation why that is the appropriate standard.[11] A few hedge and state that the plan would fail under either standard.[12] This is exactly what the district court did in this case.[13] As we view it, however, this is a case in which the plan would not pass a clear and convincing standard, but, as will be discussed below, it was not clearly erroneous for the bankruptcy court to conclude that the plan was feasible and the cramdown fair and equitable under a preponderance standard.

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[9]*See e.g., In re Winship*, 397 U.S. 358, 371, 90 S. Ct. 1068, 1076, 25 L. Ed. 2d 368, 379 (1970) (Harlan, J., concurring).

[10]*See e.g., Aetna Insurance Co. v. Paddock*, 301 F.2d 807, 811 (5th Cir. 1962).

[11]*See e.g., In re Mcorp Financial, Inc.*, 137 B.R. 219, 225 (Bkrtcy. S.D. Tex. 1992) and cases cited therein.

[12]*See e.g., In re Rusty Jones, Inc.*, 110 B.R. 362, 373 (Bkrtcy. N.D. Ill. 1990).

[13]*Briscoe*, 138 B.R. at 805.

The United States Supreme Court has on several occasions discussed when particular standards of proof are applicable. Chief Justice Burger in *Addington v. Texas* spoke of the different factual settings which prompt a particular standard. "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties."[14] In such a case the "plaintiff's burden of proof is a mere preponderance of the evidence".[15] At the other end of the spectrum is a criminal case. The nature of a criminal proceeding has led our legal system to require that the guilt of the accused be proved beyond a reasonable doubt. Between these two poles is some middle standard. "The intermediate standard, which usually employs some combination of the words 'clear,' and 'cogent,' and 'unequivocal,' and 'convincing,' is less commonly used, but nonetheless 'is no stranger to the civil law.'"[16] The Chief Justice noted that this standard had typically been employed in civil cases when "the interests at stake are deemed to be more substantial than mere loss of money".[17] He proceeded to cite several cases in which the Supreme Court had used the clear and convincing standard "to protect particularly important individual

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[14]*Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct 1804, 1807, 60 L. Ed. 2d 323 (1979).

[15]*Id.*

[16]*Addington* at 424, 99 S. Ct. at 1808 quoting *Woodby v. INS*, 385 U.S. 276, 285, 87 S. Ct. 483, 487, 17 L. Ed. 2d 362, 368 (1966).

[17]*Addington*, 441 U.S. at 424, 99 S. Ct. at 1808.

interests".[18] These concerned deportation and denationalization. *Addington*, itself, concerned involuntary commitment to a mental institution, and the Court rejected the suggestion that preponderance was the correct burden.

This case clearly does not fit within any of the above "liberty" categories. The Supreme Court, however, gives further guidance in several opinions in which it held that "clear and convincing" was the incorrect standard and that "preponderance" should be used. In *Herman & MacLean v. Huddleston*[19], Justice Marshall for the Supreme Court reversed this Court's conclusion that the clear and convincing standard was appropriate in a 10b-5 case, although the late Judge Rubin had suggested that because of its analogy to civil fraud and its effect on the defendant's reputation, the higher standard was the correct one. Justice Marshall's opinion relied on some older cases in which it seems that the Court contemplated only preponderance or reasonable doubt.[20] The Court unanimously refused, however, to depart from the preponderance standard although the case involved fraud. This may express a more restricted view of when clear and

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[18]*Id.*

[19]459 U.S. 375, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983).

[20]*U.S. v. Regan*, 232 U.S. 37, 34 S. Ct. 213, 58 L. Ed. 494 (1914) (preponderance is appropriate in a civil suit even though it involves proof of acts that expose a party to a criminal prosecution). *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S. Ct. 120, 88 L. Ed. 88 (1943) (preponderance is sufficient to establish fraud under § 17(a) of the 1933 Act).

convincing is appropriate than the *Addington* Court which noted that clear and convincing had often been used in civil cases involving fraud or "some other quasi-criminal wrongdoing".[21]

In 1991, the Supreme Court in *Grogan v. Garner*[22] reversed the Eight Circuit which had held that clear and convincing was the creditor's standard of proof to show that a debtor's debt was not dischargeable under 11 U.S.C. § 523(a) because it had been procured by fraud. The Court, after citing the "particularly important interests" language of *Huddleston* and *Addington*, observed that both the language of the statute and the statutory history were silent as to burden of proof. The Court viewed this silence as "inconsistent with the view that Congress intended to require a special, heightened standard of proof".[23] Moreover, the Court examined the conflicting interests and concluded that proof by a preponderance of the evidence would reflect "a fair balance" between the conflicting interests. [24]

[3] In this case, the district court found *Grogan* inapplicable because it involved dischargeability. Considering the other precedents and the process of the

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[21]*Addington*, 441 U.S. at 424, 99 S. Ct. at 1808, 60 L. Ed. 2d at 329.

[22]498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991).

[23]*Grogan* at 286, 111 S. Ct. at 659, 112 L. Ed. 2d at 764.

[24]*Grogan* at 287, 111 S. Ct. at 659, 112 L.Ed. 2d at 765.

Grogan Court, we find this to be too narrow a reading of *Grogan*. In this case, both § 1129 and the legislative history are silent as to the burden of proof. This case is solely about money. There are not even any quasi-liberty interests at stake. It is correct, of course, as Justice Brandeis noted during the depression in a case involving the significant alteration of farm mortgagees' rights, that the Bankruptcy laws are subject to the Takings clause.[25] The Code, however, has been the primary source of the creditors' protections, not the Fifth Amendment. Congress provides protections for creditors, and in many instances it allows debtors to impinge on creditor's state law rights. Bankruptcy frequently rewrites the secured creditor's state law bargain. An example of this is the automatic stay of § 362, as a result of which the creditor has lost the right of foreclosure. The calculation of claims under § 502 is another example of the Code rewriting the secured creditor's bargain. The combination of legislative silence, Supreme Court holdings, and the structure of the Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof both under § 1129(a) and in a cramdown.[26]

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[25]*Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593 (1935).

[26]Heartland suggests that because the word "indubitable" (meaning, according to Webster, "too evident to be doubted; unquestionable") is used in the fair and equitable requirement of § 1129(b), a cramdown requires more than preponderance. Heartland is confusing the issue. § 1129(b)(2)(A)(iii) states that "With respect to a class of secured claims, the plan provides . . . for the realization by such holders of the undubitable equivalent

B. *Feasibility of the Reorganization*

[4] As numerous courts have explained, "the court need not require a guarantee of success,"[27] which of course would be difficult to predict for any venture much less one emerging from chapter 11. "Only a reasonable assurance of commercial viability is required."[28] Our task is to determine whether it was clearly erroneous for the bankruptcy court to find that the plan provided a reasonable assurance of commercial viability by a preponderance of the evidence.

This case presents a difficult appellate review because the bankruptcy court has itself acknowledged that the reorganization has only a "marginal prospect of success". The district court paraphrased the familiar language from *Anderson v. Bessemer City* in which the Supreme Court reiterated that the clearly erroneous standard "does not entitle a reviewing court to reverse the finding of the trier of fact simply because it would have

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of such claims." Under this option, the debtor must show that the creditor will receive the indubitable equivalent of its claims by a preponderance of the evidence. The level of proof to show indubitability is not raised merely by the use of the word "indubitable". "Indubitable" modifies "equivalent" not "provides". Section F discusses the debtor's satisfaction of the fair and equitable requirement.

[27]*See e.g., In re Lakeside Global II*, 116 B.R. 499, 507 (Bkrtcy. S.D. Tex. 1989).

[28]*Id.*

decided the case differently."[29] It does not, however, appear to have taken these words to heart nor those of Justice Jackson to which the *Anderson* Court referred, who explained in the well-known antitrust case, *U.S. v. Yellow Cab*, [30] that "where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous".[31] The Anderson Court further explained that, "This is so even when the [finder of facts] findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts."[32]

The bankruptcy court found that the debtor could fund its debt service to Heartland and pay operating expenses out of its rental income. The bankruptcy court noted that occupancy had increased at the property during the pendency of this case from 55% to 85%, and that evidence suggested that occupancy would increase to 90%. The debtor's historic turnover rate is considerably less than its neighbors, and it requires a one-year lease and a security deposit. Although economic occupancy is less than physical occupancy because of promotions, there is no indication that this is more than a temporary occurrence. Heartland has further suggested that the debtor is unable to pay for necessary repairs. The bankruptcy court found

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[29]470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985).

[30]338 U.S. 338, 70 S. Ct. 177, 94 L. Ed. 150 (1949).

[31]*Anderson*, 470 U.S. at 574, 105 S. Ct. at 1511 paraphrasing *Yellow Cab*, 338 U.S. at 342, 70 S. Ct. at 179.

[32]*Anderson*, 470 U.S. at 574, 105 S. Ct. at 1511.

that some of the repairs are urgent, and these could be funded from insurance proceeds. The rest could be delayed and paid out of cash flow. Although the bankruptcy court cautioned the debtor that it "will have to work diligently to make this Plan succeed", it found that there was a reasonable prospect for success and that the plan would not likely be followed by further reorganization or liquidation. True, some triers of fact *may* have found that the evidence tipped slightly against feasibility, but the bankruptcy court's finding that this plan was feasible cannot be characterized as clearly erroneous.

C. *Classification of Claims*

Heartland argues that the debtor's separate classification of the unsecured creditors violated § 1122.[33] Although all the unsecured creditors will receive the same treatment, classification matters because to effect a cramdown at least one impaired class must vote to accept the plan. If there was only one unsecured class, Heartland's ten million dollar claim would prevent the class from accepting the plan under § 1126, and cramdown

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[33]11 U.S.C. § 1122 provides:

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

would not be allowed. We must determine therefore whether the bankruptcy court erred in permitting this separate classification.

Matter of *Greystone*[34] is a recent and leading case on classification of claims. The general rule of *Greystone* is that "thou shalt not classify similar claims differently in order to gerrymander an affirmative vote on a reorganization plan."[35] *Greystone*, however, recognized that there may be good business reasons to support separate classification. *Greystone* also noted that, "Whether there were any good business reasons to support the debtor's separate classification is a question of fact" and thus subject to clearly erroneous review.[36] The Court of Appeals for the Sixth Circuit in *U.S. Truck*[37] enunciated the business reason justification for separate classification. In *U.S. Truck*, the court allowed the debtor to place the Teamsters in a separate class because the Teamsters had "a different stake in the future viability of the reorganized company and [had] alternative means at its disposal for protecting its claim".[38] While the business justification was sufficient in *U.S. Truck*, it was not in *Greystone*, because there was no evidence that the debtor's ongoing business

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[34]*Matter of Greystone*, 948 F.2d 134 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S. Ct. 72, 121 L. Ed. 2d 37 (1992).

[35]*Greystone* at 139.

[36]*Greystone* at 141 n.7.

[37]*In re U.S. Truck*, 800 F.2d 581 (6th Cir. 1986).

[38]*U.S. Truck* at 587.

would be affected if separate classification were not permitted.

[5] These two carefully considered opinions guide our discussion in this case. This city of Fort Worth is distinct from other creditors including Heartland. Not only does it have non-creditor interests relating to its urban housing program, but it contributes $20,000 a month in rental assistance. Heartland argues that the plan is not feasible because there is no assurance of continued rental assistance from the city. This argument suggests that the relationship with the city is essential to the continued operation of this housing complex. Its continuing contributions and interests make it distinct from Heartland and the trade creditors. We emphasize the narrowness of this holding. In many bankruptcies, the proffered reasons as in *Greystone* will be insufficient to warrant separate classification. Here it seems justified. Moreover, as Heartland nominates one of the three trustees, it has means for protecting its interests. Therefore, we hold that the bankruptcy court was not clearly erroneous in separately classifying the city's unsecured claim.

D. *The Good Faith Requirement*

[6] § 1129(a)(3) requires that the debtor propose the plan in good faith. This Court has held that, "Where the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied."[39] The bankruptcy court found good faith

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[39]*Matter of Sun Country Development, Inc.*, 764 F.2d 406, 408 (5th Cir. 1985).

because "the Plan provides a vehicle for restructuring the debt of the Property and preserving the Property for the benefit of both creditors and the Fort Worth community. Moreover, none of the interest holders of the Debtor will retain anything under the Plan." A plan may not be the one that the creditors would themselves design and may indeed not be confirmed and yet still pass the good faith requirement. This plan which the bankruptcy court did confirm and in which the debtor will not retain any equity interest satisfies the good faith requirement.

E. *The Best Interests of Creditors Test*

[7] § 1129(a)(7) requires that each holder of a claim in a class either accept the plan or receive at least as much as it would receive in a chapter 7 liquidation. Because only Heartland objects, our task is to determine whether it will receive as much under the plan in present value terms[40] as it would if the property were sold today. The bankruptcy court assigned a value of $8.2 million to the property. Assuming that the property could be sold today, that is the amount the court concluded that Heartland would receive, and that is all that Heartland would ever receive. Under the plan, Heartland will not only receive $8.2 million but could receive periodic payments towards its unsecured claim.[41] In addition, it will share in any appreciation in the property. We need

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[40]*In re Mortgage Investment Co. of El Paso, Texas*, 111 B.R. 604, 615 (Bkrtcy. W.D. Tex. 1990).

[41]The absolute priority rule is not implicated because no class junior to Heartland's dissenting unsecured class will receive or retain anything under the plan.

not concern ourselves with any additional benefits Heartland may receive, for § 1129(a)(7) requires only that Heartland receive the present value of $8.2 million. There is no evidence that the property will decline in value before Heartland is paid in full its $8.2 million secured claim, and as explained in the next section of this opinion, the interest rate fully compensates Heartland for the delay in payment. Heartland may wish to cut its losses now rather than wait and see if it may eventually receive more, but the rationale underlying Congressional establishment of the cramdown prevents the creditor from blocking a fair and feasible reorganization.

F. *The Fair and Equitable Requirement for a Cramdown.*

§ 1129(b) requires that a cramdown be fair and equitable.[42] The statute provides three alternative minimum requirements for the plan to be considered fair and equitable with regard to secured creditors:

1129(b)(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides —

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[42]For a recent discussion of the fair and equitable requirement *see* Jack Friedman, *What Courts Do To Secured Creditors In Chapter 11 Cram Down*, 14 Cardozo L. Rev. 1495 (1993).

> (i)(I) that the holders of such claims retain the lien securing such claims, whether the property subject to such lien is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the lien securing such claims, free and clear of such lien, with such lien to attach to the proceeds of such sale, and the treatment of such lien on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

The bankruptcy court held the plan to be feasible under the first option. The district court reversed as it viewed the "indubitable equivalent" language as mandatory rather than as one of three options.[43]

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[43]The district court stated that, "'Fair and equitable' as used in the context of a cramdown means that, at a minimum, the secured creditor must receive the indubitable equivalent of his secured claim." *Briscoe* at 810.

[8] While this Court has held that simple technical compliance with one of the three options in 1129(b)(2)(A) may not necessarily satisfy the fair and equitable requirement,[44] it has not transformed the "or" in 1129(b)(2)(A) into an "and". As we hold that the plan satisfied 1129(b)(2)(A)(i), we need not attempt to decipher the meaning of "indubitable equivalent".[45]

1129(b)(2)(A)(i) requires that the secured creditor retain its lien and receive "deferred cash payments totaling at least the allowed amount of such claim". The district court was concerned that the plan did not adequately ensure that Heartland will retain its liens. We interpret the plan as ensuring that if the debtor fails to comply with its debt service obligations, Heartland would have the right to foreclose. The language about the "letter and spirit of the plan" is not intended to affect Heartland's right to foreclose if it does not get paid what it is due under the plan. Deferred cash payments consist of an appropriate

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[44]*Matter of D & F Construction, Inc.*, 865 F.2d 673, 675-76 (5th Cir. 1989). In that case, the plan's negative amortization required the secured creditor to contribute additional money to the plan for twelve years before principal would be repaid. The creditor's ability to foreclose during this period was also impaired. This Court assumed for purposes of the case that the requirements of 1129(b)(2)(A) had been "literally met."

[45]One author has commented that, "More has been written on indubitable equivalence with less effect than on almost any other area of bankruptcy law." Richard F. Broude, *Reorganization Under Chapter 11 of the Bankruptcy Code*, 13-24 (1986).

interest rate and an amortization of the principal which constitutes the secured claim.

[9, 10] We review a bankruptcy court's calculation of an appropriate interest rate for clear error.[46] Courts have used a wide variety of different rates as benchmarks in computing the appropriate interest rate (or discount rate as it is frequently termed) for the specific risk level in their cases.[47] In this case the bankruptcy court adopted the contract rate which was 10.25%. Numerous courts have chosen the contract rate if it seemed to be a good estimate as to the appropriate discount rate.[48] Often the contract rate will be an appropriate rate but reference to a similar maturity Treasury rate is instructive. The Treasury rate is helpful because it includes all necessary factors except the risk premium.[49] Treasury bonds with

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[46]*In re Bryson Properties XVIII*, 961 F.2d 496, 500 n.5 (4th Cir. 1992).

[47]A properly calculated interest rate should factor in the appropriate risk. *See e.g., In re Guildford Telecasters, Inc.*, 128 B.R. 622 (Bkrtcy. M.D.N.C. 1991); *In re Sherwood Square Associates*, 107 B.R. 872 (Bkrtcy. D. Md. 1989). C. Frank Carbineer's *Present Value in Bankruptcy: The Search for an Appropriate Cramdown Discount Rate*, 32 S.D.L. Rev. 42 (1987) is an excellent introduction to this subject.

[48]*See e.g., In re Monnier Bros.*, 755 F.2d 1336, 1339 (8th Cir. 1985); *Guildford* at 626.

[49]We assume that Treasury bonds as they are backed by the United States Government contain zero risk.

15 years to maturity (the term of this reorganization) were priced at around 6.4% in June 1993. A discount rate of 10.25% is more than 50% greater than the riskless rate. This risk premium is comparable with that of many "junk bonds". While it may in fact be too high a rate considering that we only reach this stage once the plan has been judged feasible,[50] it was not clearly erroneous for the bankruptcy court to find that this risk premium adequately compensates Heartland for not receiving its money today.

[11] Having found the interest rate to be acceptable, we must next consider the balloon payment. These two issues are interrelated for the balloon payment adds some measure of risk, but the interest rate appears adequate to cover this risk. Heartland and the district court suggest that allowing a balloon payment is unacceptable as there is no immediate indication from where the funds will come to pay off the balloon. As a general matter, many courts have held balloon payments to satisfy 1129(b).[51] It is reasonable to assume that the property itself will provide the source for the balloon payment. There is no evidence that the property will decline in value. Therefore, when the balloon is due, either the property will be sold which will provide the balloon or refinancing will be possible.[52] Estimating property values fifteen years hence is inherently speculative, but the evidence presented to the bankruptcy

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[50]*See In re Landmark at Plaza Park, Ltd.*, 7 B.R. 653, 658 n.8 (Bkrtcy. D.N.J. 1980).

[51]*See e.g., Bryson* at 501; *Guildford* at 627.

[52]This satisfies § 1123(a)(5) which requires that the plan provide adequate means for its implementation.

court did not suggest that the property would decline in value so that the debtor would be unable to pay Heartland its remaining principal. Therefore, we hold that the plan satisfies 1129(b)(2)(A)(i). No other factors in this case lead us to hold that compliance with 1129(b)(2)(A)(i) fails to satisfy the fair and equitable requirement. Accordingly, we affirm the bankruptcy court's holding that the plan is fair and equitable.

G. *Administrative Claims and Use of Cash Collateral.*

Heartland argues that the debtor impermissibly hired an appraiser, an architect, and a marketing consultant. The bankruptcy judge approved these nunc pro tunc. Heartland suggests that this is an impermissible use of cash collateral in violation of § 506(c), and that no exceptional circumstances warranted the nunc pro tunc order.

[12] We review the bankruptcy court's implicit finding of no violation of § 506(c) under the clearly erroneous standard.[53] Its nunc pro tunc order is reviewed for abuse of discretion.[54]

[13] Heartland is correct that this Court has denied a utility bill under § 506(c). In that case, however, this Court upheld a bankruptcy court's conclusion because it was not clearly erroneous to conclude that keeping the

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[53]*Matter of Delta Towers*, 924 F.2d 74, 77-78 (5th Cir. 1991).

[54]*Matter of Triangle Chemicals*, 697 F.2d 1280, 1288-89 (5th Cir. 1983).

lights on did not benefit the creditor of a bankrupt hotel, whose security interest was solely in the building and movables and had no interest in the operation. The district judge had reversed the bankruptcy judge, and this Court observed that while "there is evidence to support the district court's findings [that the utilities prevented the deterioration of the building and maintained the going concern value], the district court does not enjoy absolute freedom to make its own findings".[55] There is also considerable difference between utility expenses for a bankrupt hotel and hiring an appraiser, an architect, and a marketing consultant for an operating and expanding *apartment* complex in which the creditors have a considerable interest. Indeed, as the bankruptcy court used the appraiser's estimate and the occupancy rate increased after the architect and marketing consultant were hired, it does not seem clearly erroneous for the bankruptcy court to have permitted these expenses. The bankruptcy court found that the marketing consultant's fee of $23,000 was justified. We affirm that finding but urge prudence on the part of debtors and careful scrutiny on the part of bankruptcy courts to ensure that expenses are tailored carefully to the need.

As for these orders being nunc pro tunc, the equitable discretionary powers of the bankruptcy court are broad; in this situation the bankruptcy court did not abuse its discretion in granting these orders nunc pro tunc. These expenses were incurred during a period when the debtor's original counsel was forced to recuse itself as a result of a conflict and replacement representation had not

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[55]*Delta Towers* at 78.

yet been retained. Very soon after the debtor obtained substitute counsel, approval of the debtor's use and retention of these professionals was sought. Therefore, while again encouraging bankruptcy courts to examine carefully the grant of nunc pro tunc orders, we hold that in this case the bankruptcy court did not abuse its discretion.

V.

This is a difficult case and both the bankruptcy court and the district court are to be commended for their efforts. We REVERSE the district court and AFFIRM the bankruptcy court's confirmation of the plan and orders nunc pro tunc and wish the trustees good luck in reorganizing this property.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
Briscoe Enterprises Ltd., II,	§	
	§	
	§	Civil Action No.
Debtor.	§	4-91-457-A
	§	
Heartland Federal Savings and Loan Association,	§	
	§	(Consolidated with
	§	
Appellant,	§	Civil Action No.
	§	4-91-458-A,
vs.	§	Civil Action No.
	§	4-91-459-A,
Briscoe Enterprises Ltd., II,	§	Civil Action No.
	§	4-91-460-A,
	§	Civil Action No.
Appellee.	§	4-91-461-A)

FINAL JUDGMENT

Consistent with the memorandum and opinion of even date herewith,

The court ORDERS, ADJUDGES and DECREES that:

1. The bankruptcy court's findings of fact and conclusions of law Nos. 12, 13, 15, 17, 22, 26, 27, 31, 36, 37, 38, 41, 42 and 43 be, and are hereby, set aside;

2. The bankruptcy court's orders (a) confirming debtors fourth amended plan of reorganization, (b) employing and retaining James W. Daniels & Associates, Inc., as appraiser, and (c) employing and retaining John R. Horton, Inc., as architectural design and supervision company, and the ruling of the bankruptcy judge approving the employment of the marketing agent, nunc pro tunc, be, and are hereby, REVERSED; and

3. These consolidated actions be, and are hereby, REMANDED for further action consistent with the court's rulings in the memorandum opinion and order signed this date and with this final judgment.

SIGNED April 14, 1992.

s/John McBryde
John McBryde
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
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In re:	§	
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Debtor.	§	4-91-457-A
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Briscoe Enterprises Ltd., II,	§	Civil Action No.
	§	4-91-460-A,
	§	Civil Action No.
Appellee.	§	4-91-461-A)

MEMORANDUM OPINION AND ORDER

This consolidated action encompasses appeals from five separate orders rendered by the United States Bankruptcy Court, Northern District of Texas, Fort Worth Division, the Honorable Massie Tillman presiding. The court, having reviewed the briefs of appellant, Heartland Federal Savings and Loan Association ("Heartland"), and appellee, Briscoe Enterprises Ltd., II ("Debtor"), the record on appeal and applicable authorities, makes the following determinations:

I.
Jurisdiction

The appeals are from orders entered by the bankruptcy court on April 24, 1991 (one order), January 25, 1991 (three orders), and January 24, 1991 (one order). This court's jurisdiction exists pursuant to 28 U.S.C. § 158(a).

II.
Undisputed Facts

Debtor, a Texas limited partnership, owns a 784-unit apartment complex known as the Regalridge Square Apartments ("Regalridge") in Fort Worth, Texas. Regalridge houses low to moderate income families, many of whom receive rent subsidies. Regalridge was constructed in two phases with financing provided by Heartland's predecessor. In connection with the development of each phase, debtor executed a non-recourse note in the original amount of $9.5 million dollars and a deed of trust granting a lien in that portion of the property then being developed. Heartland is the owner and holder of the notes and deeds of trust, dated April 11, 1983, and January 31, 1984, respectively. Additional financing of $3.5 million dollars for each phase was provided by the City of Fort Worth ("City"), which retained inferior liens in the property.

Debtor defaulted on its notes by failing to make interest payments in October, November, and December 1988. It entirely ceased servicing its debt to Heartland in July 1989.

III.
Proceedings

A voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code was filed by debtor on December 29, 1989; and, it filed its plan of reorganization on June 11, 1990. On August 17, 1990, debtor filed an unsigned copy of its proposed disclosure statement. It filed its first amended plan of reorganization on November 16, 1990. The plan was later modified by the filing of debtor's second amended plan of reorganization on December 12, 1990, third amended plan of reorganization on December 20, 1990, and fourth amended plan of reorganization on January 22, 1991. Debtor filed its first amended disclosure statement on November 16, 1990, second amended disclosure statement on December 12, 1990, and third amended disclosure statement on December 20, 1990. The bankruptcy court approved the third amended disclosure statement following a hearing on December 21, 1990.

Beginning January 23, 1991, and continuing on four additional days, the bankruptcy court conducted a hearing to determine whether debtor's fourth amended plan should be confirmed. Before taking up the matter of plan confirmation, the bankruptcy court heard and considered various pending motions. First, the court considered and granted debtor's applications to approve the employment of an appraiser and an architect, nunc pro tunc. The court then considered and denied Heartland's motions for administrative claim and for deposit of consideration. During the confirmation hearing, the bankruptcy court heard the testimony of Anne Sadovsky, debtor's marketing agent, and approved debtor's application to employ her, nunc pro tunc. At the conclusion of the confirmation

hearing on March 14, 1991, the bankruptcy court stated that the prospect of debtor's meeting the debt service requirement of the plan was "marginal." Nevertheless, on April 23, 1991, the bankruptcy court signed its findings of fact and conclusions of law and rendered its order confirming debtor's fourth amended plan of reorganization.[1]

Heartland filed separate appeals from the bankruptcy court's orders (1) confirming debtor's fourth amended plan of reorganization, (2) employing and retaining James W. Daniels & Associates, Inc., as appraiser, (3) denying motion to allow administrative claim, (4) employing and retaining John R. Horton, Inc., as architectural design and supervision company, and (5) denying Heartland's motion for deposit of consideration.

Apparently the bankruptcy court did not sign a separate order approving the application to employ marketing agent, nunc pro tunc, as it had on the applications to approve employment of an appraiser and an architect. The docket sheet reflects, and the record on appeal contains, only a proceeding memorandum noting that the application was granted. Presumably, for that reason Heartland did not file a separate appeal as it did with regard to the other applications and motions heard at the confirmation hearing. In any event, Heartland did include the approval of the marketing agent's employment as an issue on appeal of the plan confirmation and debtor has not complained of the procedure followed.

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[1]A copy of the bankruptcy court's findings of fact and conclusions of law taken from the record is attached as an appendix to this memorandum opinion and order.

IV.
The Plan

Debtor's plan is typical of Chapter 11 reorganization plans in that it begins with a list of definitions of terms used in the plan (Article I), certain general terms and conditions (Article II), and the classification of claims and interests (Article II). Article IV describes the treatment of the six classes of claims, to wit:

Class 1 allowed administrative claims;
Class 2 allowed priority claims;
Class 3 allowed City claim;
Class 4 allowed Heartland claim;
Class 5 allowed unsecured claims; and
Class 6 holders of interests in the debtor.

In particular, it provides that City's claim is to receive the same treatment as the Class 5 unsecured claims. Holders of Class 5 claims are to receive a pro rata share of the beneficial interests in the Regalridge trust, hereinafter described, evidenced by certificates of beneficial interest. The Regalridge trustees are to make periodic cash payments on at least an annual basis when they, in their discretion, determine that the trust has available net cash flow that is not required to be reserved for another purpose.

As for Heartland's claim, the plan provides that the secured portion thereof shall be paid in monthly installments of principal and interest as though amortized over thirty years from the effective date of the plan, with interest at the rate provided in the January 31, 1984, promissory note executed by debtor. The secured claim is

to be paid in full upon the sale of the property or the expiration of fifteen years, whichever shall first occur. If Heartland fails to make a timely § 1111(b) election, the unsecured portion of its claim is to receive the same treatment as Class 5 unsecured claims. Article IV further provides that Heartland will retain its lien in the property and that

> all other terms and conditions of the treatment of [Heartland's claim] described in the plan and the lien securing same shall be similar to the original terms of Heartland's note and lien, except where inconsistent with the letter and spirit of this plan.

Fourth Amended Plan of Reorganization at 12, ¶ 4.4.c. The plan does not contain as an exhibit or otherwise the note and deed of trust, or any of the terms thereof, to be executed in favor of Heartland.

Articles V and VI describe plan implementation and formation of the Regalridge trust, to which ownership of the property is to be transferred. The trust is to be governed by three trustees to be selected, one each, by the Fort Worth NAACP, City, and Heartland. The Fort Worth NAACP is not a creditor of debtor. The plan provides that the trustees will have exclusive power and control over the operation of Regalridge and that they will not be subject to any court supervision.

Articles VII through XIV contain the remaining plan provisions. None of these is particularly pertinent to the issues raised on appeal, except that paragraph 8.2 of Article VIII does provide that the plan may be modified

following confirmation after notice and hearing.

V.
Issues on Appeal

Heartland asserts fifty-one issues on appeal, many of which appear to present different shades of the same matter. Heartland's issues are:

1. Whether the Bankruptcy Court erred in confirming the Debtor's Fourth Amended Plan of Reorganization.

2. Whether the Bankruptcy Court erred in finding that the Debtor's Plan complied with each and every one of the requirements for confirmation under § 1129(a)(1)-(11) and § 1123 of the Bankruptcy Code.

3. Whether the Bankruptcy Court erred in finding and concluding that the Debtor had met its burden of proof on the requirements of §1129(a) and §1123 by the preponderance of the evidence.

4. Whether the Bankruptcy Court erred in finding that the debtor's Plan met each of the requirements for confirmation under § 1129(b).

5. Whether the Bankruptcy Court erred in finding that the Debtor had met its burden of proof on the requirements of § 1129(b) by clear and convincing evidence.

6. Whether the Bankruptcy Court erred in approving the applications to employ professionals nunc pro tunc.

7. Whether the Bankruptcy Court erred in approving the payments made to professionals.

8. Whether the Bankruptcy Court was clearly erroneous in its findings.

9. Whether the Bankruptcy Court erred in entering the following orders on January 25, 1991: (a) Order Employing and Retaining John R. Horton, Inc. as Architectural Design and Supervision Company; (b) Order Employing and Retaining James W. Daniels and Associates as Appraiser for the Debtor; and (c) Order Denying Heartland's Motion for Deposit of Consideration to be Distributed Under Plan.

10. Whether the Bankruptcy Court erred in entering an Order Denying Heartland's Motion to Allow Administrative Claim on January 24, 1991.

11. Whether the Bankruptcy Court erred in entering the Order Confirming the Debtor's Fourth Amended Plan of Reorganization ("Plan") on April 24, 1991.

12. Whether the Bankruptcy Court erred in approving the Debtor's Third Amended Disclosure Statement on December 21, 1990, and in finding that the Debtor's Third Amended Disclosure Statement contained adequate information as required by 11 U.S.C. §1125.

13. Whether the Bankruptcy Court erred in finding that the Debtor's modifications to the Plan, which were included in the Plan after voting thereon, did not adversely change the treatment of the claim of any creditor.

14. Whether the Bankruptcy Court erred in finding that (a) a reasonable basis exists for separate classifications of the claims and interests in each class, (b) that the claims and interest of each class under the Plan are substantially similar under the Plan and (c) such classification satisfies the requirements of §1122(a) of the Bankruptcy Code.

15. Whether the Bankruptcy Court erred in finding that the interest holders and the Debtor do not receive or retain any property under or pursuant to the Plan.

16. Whether the Bankruptcy Court erred in finding that Heartland was required to make an election under § 1111(b) in order to have its secured claim classified separately from its unsecured claim.

17. Whether the Bankruptcy Court erred in finding that two unsecured classes of non-insider creditors voted to accept the Plan.

18. Whether the Bankruptcy Court erred in finding that ". . . the control of two classes by Heartland effectuates a non-substantive and technical amendment to the Plan." Record No. 152, Findings p. 4, ¶ 15.

19. Whether the Bankruptcy Court erred in overruling Heartland's objections to confirmation of the Plan based on technical issues relating to classification.

20. Whether the Bankruptcy Court erred in finding that the provisions of the Plan regarding the procedure for selection, appointment, removal, qualifications and duties of the "Regalridge Trustees" and

who was to select these trustees are consistent with the interests of creditors and with public policy.

21. Whether the Bankruptcy Court erred in finding that the Plan provides for distribution to creditors on a pro-rata basis of the cash flow on at least an annual basis.

22. Whether the Bankruptcy Court erred in finding that (1) Heartland will retain its liens under the Plan, (2) the property will probably support debt service equal to Heartland's secured claim, and (3) Heartland will receive the present value of its secured claim.

23. Whether the Bankruptcy Court erred in finding that, ". . . over the next six years, money will be available as cash flow for distribution to creditors whose claims will be treated as unsecured Class 5 claims after payment of ordinary and necessary operating expenses and payment of debt service on Heartland's secured claim." Record No. 152, Findings p. 7, ¶ 27.

24. Whether the Bankruptcy Court erred in finding that Heartland's unsecured deficiency claim is in the approximate amount of $10,000,000.00.

25. Whether the Bankruptcy Court erred in finding that the Class 5 creditors accepted the Plan and that no Class 5 creditors voted against the Plan.

26. Whether the Bankruptcy Court erred in finding that the Plan is feasible.

27. Whether the Bankruptcy Court erred in finding that the Plan has even a marginal prospect of

success. Record No. 152, Findings p. 7, ¶ 31.

28. Whether the Bankruptcy Court erred by failing to apply the correct legal standard in confirming the Plan.

29. Whether the Bankruptcy Court erred in accepting the Debtor's projections while cautioning that the Debtor ". . . will have to work diligently to make the Plan succeed." Record No. 152, Findings, p. 7, ¶ 36.

30. Whether the Bankruptcy Court erred in finding that only $250,000.00 to $300,000.00 is needed to make repairs on the property.

31. Whether the Bankruptcy Court erred in finding that the value of the property and Heartland's secured claim is $8,200,000.00.

32. Whether the Bankruptcy Court erred by applying an improper legal standard to determine the value of Heartland's collateral and secured claim.

33. Whether the Bankruptcy Court erred in finding that the property will generate sufficient cash flow to pay necessary and normal operating expenses, the secured debt of Heartland at a market rate of interest, and a dividend to Class 5 creditors.

34. Whether the Bankruptcy Court erred in finding that for the past several months the Debtor has met or exceeded $200,000.00 per month in income and that an income of $200,000.00 per month will be sufficient to fund the Plan.

35. Whether the Bankruptcy Court erred in finding that occupancy at the property has increased from 55% to 85% and will probably increase to 90% in the first half of 1991.

36. Whether the Bankruptcy Court erred in finding that (a) the Debtor has demonstrated an ability to make needed repairs on the property, (b) some needed repairs to the property could be delayed until the end of the year and, (c) cash flow will be available by the end of the year to pay for deferred repairs.

37. Whether the Bankruptcy Court erred in finding that the Plan is not likely to be followed by the need for further financial reorganization or liquidation.

38. Whether the Bankruptcy Court erred in finding that, notwithstanding Heartland's rejection of the Plan, the Plan may be confirmed pursuant to §1129(b), that the Plan does not discriminate unfairly against and is fair and equitable to Heartland.

39. Whether the Bankruptcy Court erred in finding that the treatment of Heartland's deficiency claim in Class 5 is identical to the treatment of all Class 5 claims.

40. Whether the Bankruptcy Court erred in finding that the Plan protects the legal rights of Heartland's unsecured deficiency claim.

41. Whether the Bankruptcy Court erred in finding that ". . . no holder of any claim or interest junior to Heartland's claims under the Plan will receive or retain on account of the junior claim or interest any property under the Plan". Record No. 152, Findings p. 10, ¶ 43.

42. Whether the Bankruptcy Court erred in denying Heartland's Motion to Dismiss or Convert the bankruptcy case.

43. Whether the Bankruptcy Court erred in its failure to make any finding regarding the apparent grant of a discharge of the interest holders of the Debtor.

44. Whether the Bankruptcy Court erred in its failure to make any finding regarding the establishment and use of the Distribution Fund.

45. Whether the Bankruptcy Court erred in its failure to make a finding that the projections used by the Debtor at the Confirmation hearing were not the same projections mailed out to the creditors for voting on the Plan.

46. Whether the Bankruptcy Court erred in its failure to make a finding that the change in projections was a material change to the Plan.

47. Whether the Bankruptcy Court erred in its failure to make any findings regarding the fairness, specificity or legality of any of the provisions of the Regalridge Trust Agreement and Plan.

48. Whether the Bankruptcy Court erred in relying upon the Court's personal observations of the property in confirming the Plan.

49. Whether the Bankruptcy Court erred in denying Heartland's Motion to Strike Affidavit of Tallying Agent.

50. Whether the Bankruptcy Court erred in finding that the balloting of classification of creditors was proper and that any error in the balloting of classification of any creditors was harmless.

51. Whether the Bankruptcy Court erred in entering an Order Approving and Granting Amendment to the Confirmed Fourth Amended Plan of Reorganization.

Having thus listed the issues, Heartland proceeds to divide its brief into categories as follows:

I. The debtor's plan is not feasible, § 1129(a)(11).

II. The plan fails to meet the mandatory requirements for confirmation under the Bankruptcy Code.

III. The plan fails to meet the requirements for cramdown under the Bankruptcy Code, § 1129(b).

IV. The plan violates the absolute priority rule.

V. The plan fails to comply with the mandatory provisions of § 1123.

VI. The plan expends Heartland's cash collateral for unallowable purposes, § 506(c).

VII. Improper approval of professionals and their fees, nunc pro tunc.

VIII. Heartland's administrative claim and motion for deposit of consideration.

Heartland does not state which particular issues belong to each of these categories.

The court's discussion of the issues will focus on the eight categories defined by Heartland, but will be organized in what seems to the court to be a more logical order. The court considers that any of the issues on appeal not specifically discussed and supported by Heartland in the body of its briefs is waived. McGrudser v. Necaise, 733 F.2d 1146, 1148 (5th Cir. 1984); Ronit, Inc. v. Block Shim Development Co. - Irving In re Block Shim Development Co. - Irving), 118 B.R. 450, 452 n.2 (N.D. Tex. 1990), aff'd, 939 F.2d 289 (5th Cir. 1991).

VI.
Standard of Review

To the extent the appeal presents questions of law, the bankruptcy court's judgment is subject to de novo review. Pierson & Gaylen v. Creel & Atwood (In re Consolidated Bancshares, Inc.), 785 F. 2d 1249, 1252 (5th Cir. 1986). Findings of fact, however, will not be set aside unless clearly erroneous. Memphis-Shelby County Airport Authority v. Braniff Airways, Inc. (In re Braniff Airways, Inc.), 783 F.2d 1283, 1287 (5th Cir. 1986). A finding is clearly erroneous, although there is evidence to support it, when the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Id. The mere fact that this court would have weighed the evidence differently if sitting as the trier of fact is not sufficient to set aside the bankruptcy court's order if that court's account of the evidence is plausible in light of the record viewed in its entirety. Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

Although the parties doubtless would agree with the foregoing recitation of the standard of review on appeal, they disagree as to the burden of proof on debtor at the confirmation hearing. Heartland maintains that debtor had to prove the confirmability of its plan by clear and convincing evidence.[2] Debtor, on the other hand, states that the preponderance of the evidence[3] standard applies in all bankruptcy matters, relying on Grogan v. Garner, 111 S. Ct. 654 (1991).

In Grogan, the United States Supreme Court determined that the preponderance of the evidence standard is the appropriate standard of proof for the dischargeability exceptions in 11 U.S.C. § 523(a). 111 S. Ct. at 661. Following Grogan, the Tenth Circuit determined that the preponderance of the evidence standard also applies to dischargeability under 11 U.S.C. § 727. First National Bank of Gordon v. Serafini (In re Serafini), 938 F.2d 1156, 1157 (10th Cir. 1991). Both of these cases recognize that a debtor has no constitutional or fundamental right to a discharge that would entitle him

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[2]Evidence is clear and convincing if it places in the factfinder an abiding conviction that the truth of the factual contentions is highly probable. Colorado v. New Mexico, 467 U.S. 310, 316 (1984); Kaszuk v. Bakery & Confectionary Union, 638 F.Supp. 365, 374 (N.D. Ill. 1985), aff'd, 791 F.2d 548 (7th Cir. 1986).

[3]A preponderance of the evidence means proof sufficient to persuade the finder of fact that the proposition is more likely true than not true. Hopkins v. Price Waterhouse, 737 F. Supp. 1202, 1206 (D.D.C.), aff'd, 920 F.2d 967 (D.C. Cir. 1990).

to a heightened standard of proof. Grogan, 111 S. Ct. at 659; Serafini, 938 F.2d at 1157 n.2. The holdings in both cases are limited to the issue of dischargeability.

The court is not convinced that Grogan was intended to accomplish a wholesale destruction of the precedents set with regard to the debtor's burden of proof in other bankruptcy contexts. Grogan speaks only to the creditor's, not the debtor's, burden of proof with regard to dischargeability. The debtor's burden has traditionally been one of clear and convincing evidence, at least in the context of a cramdown. See In re Murel Holding Corp., 75 F.2d 941, 942 (2nd Cir. 1935); B.W. Alpha, Inc. v. First City Nat'l Bank of San Angelo, N.A. (In re B.W. Alpha, Inc.), 100 B.R. 831, 833 (N.D. Tex. 1988); In re Future Energy Corp., 83 B.R. 470, 481 (Bankr. S.D. Ohio 1988). Some courts have indicated that the same standard applies under 11 U.S.C. § 1129(a). In re Rusty Jones, Inc., 110 B.R. 362, 373 (Bankr. N.D. Ill. 1990); In re Agawam Creative Marketing Assocs., Inc., 63 B.R. 612, 619 (Bankr. D. Mass. 1986). The clear and convincing test is the logical one to apply because of the stricter scrutiny required when property and property rights are sought to be taken. Cf. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935) (recognizing the substantive rights of a secured creditor in specific property and noting that the bankruptcy power is subject to the Fifth Amendment). There is no question that debtor has failed to meet this burden of proof. Moreover, even if the court's analysis is incorrect and the appropriate burden of proof is one of preponderance of the evidence, the result would be the same.

VII.
Confirmability of Debtor's Plan

A. Feasibility

To be confirmed, a debtor's plan of reorganization must be feasible. 11 U.S.C. § 1129(a)(11); In re N.S. Garrott & Sons, 48 B.R. 13, 15 (Bankr. E.D. Ark. 1984). The burden of proving feasibility belongs to the debtor. In re Lakeside Global II, Ltd., 116 B.R. 499, 505 (Bankr. S.D. Tex 1989). To demonstrate feasibility, the debtor must show by concrete evidence that there will be sufficient cash flow to fund the plan and maintain operations according to the plan. In re Nelson, 84 B.R. 90, 93 (Bankr. W. D. Tex. 1988); In re Merrimack Valley Oil Co., 32 B.R. 485, 488 (Bankr. D. Mass. 1983). Factors to be considered include the debtor's prior performance, the adequacy of capital structure, the earning power of the business, economic conditions, the ability of management, the probability of the continuance of the same management, and any other related matter that determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan. Canal Place Limited Partnership v. Aetna Life Ins. Co. (In re Canal Place Limited Partnership), 921 F.2d 569, 579 (5th Cir. 1991) (per curiam approving bankruptcy court's analysis set forth as appendix to the opinion); Lakeside Global, 116 B.R. at 506. Plans that are mere visionary schemes based on speculation, conjecture, or unrealistic projections cannot be confirmed. In re Sound Radio, Inc., 93 B.R. 849, 856 (Bankr. D.N.J. 1988), aff'd in part, remanded in part, 103 B.R. 521 (D.N.J. 1989), aff'd, 908 F.2d 964 (3rd Cir. 1990).

Here, Heartland maintains that debtor's plan is but a visionary scheme because debtor has not been able to meet its own operating projections in the past and its expectations for future performance are unsupported. For example, in April 1990, debtor submitted a budget in connection with its opposition to Heartland's motion to lift the automatic stay, which projected expenditures of $1,115,000.00 for 1990. Debtor's actual expenditures for 1990 were $1,807,000.00 — thirty-eight percent more than anticipated. As for the future, debtor projects, and its plan's success depends upon achievement of, a ninety percent economic occupancy rate for 1991. Debtor has never before been able to achieve more than an eighty-five percent physical occupancy rate, at which time the economic occupancy rate was only sixty-eight and 08/100 percent. Even debtor's own expert projected a seventy percent economic occupancy rate for 1991.

More important than past inability to meet expectations is the lack of evidence to support present ability to make a plan work. Debtor's plan provides that Heartland is to receive, over a period of fifteen years, installments of interest plus only twenty percent of the principal of its secured debt. At the end of fifteen years, debtor will make a balloon payment to Heartland of approximately $6,500,000. It appears that virtually all of the income generated from Regalridge will be required to fund the plan and to keep Regalridge operating. Debtor has not made any showing of how it will be able to make the balloon payment to Heartland at the end of fifteen years. Because the plan calls for debtor to be operating on a shoestring and there has been no showing of the source of funds for the balloon payment, it is difficult to see how the plan could be feasible under the Code. Lakeside Global, 116 B.R. at 507.

In response debtor points to other evidence reflecting improved conditions at Regalridge and urges the court that two different interpretations can be made from the same set of facts. That being the case, debtor urges that the court must defer to the bankruptcy court's findings. Amadeo v. Zant, 486 U.S. 214, 223 (1988). In order for deference to be mandated, however, the bankruptcy court's findings must be plausible in light of the record viewed in its entirety. Anderson, 470 U.S. at 574. Here, the record as a whole reflects the uncertainty inherent in debtor's plan. Debtor offered no evidence on the future value of the property or on the source of funds for the balloon payment. Debtor recognizes that ninety percent economic occupancy is necessary in order for the plan to be funded, yet admits that ninety percent economic occupancy has never before been achieved.[4]

In sum, "feasibility" means that confirmation of a plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or

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[4]Debtor further argues that the plan is somehow made more feasible by the voiding of appellant's lien in debtor's personalty. See March 25, 1991, order signed by Judge Mahon in CA4-90-818-E. The lien avoidance occurred subsequent to the confirmation hearings and is not an issue on appeal. The record reflects that personalty was not included in the valuations of the property before the bankruptcy court. This point is now moot in any event, however, as the Fifth Circuit has reversed the district court's order and affirmed the decision of the bankruptcy judge denying avoidance of appellant's lien. See Heartland Federal Savings & Loan Ass'n v. Briscoe Enterprises, Ltd., II, No. 91-1525 (5th Cir. Feb. 14, 1992).

any successor to the debtor under the plan. 11 U.S.C. § 1129(a)(11). A plan that has a "marginal prospect of success"[5] because the debtor's "prospects of meeting the debt service required"[6] under the plan of reorganization are marginal is not, as a matter of law, a feasible plan. Therefore, the bankruptcy court's findings and conclusions set forth in item Nos. 31, 36, 37 and 38 of the April 24, 1991, findings of fact and conclusions of law [hereinafter "Findings"] must be set aside.[7]

B. Other Requirements of 11 U.S.C. § 1129(a)

In addition to being feasible, a plan must meet a number of other requirements, including those set forth at 11 U.S.C. §§ 1129(a)(1)-(4), (7) and (8). These requirements are briefly that: the plan comply with applicable provisions of the Bankruptcy Code [§ 1129(a)(1)]; debtor comply with applicable provisions of the Bankruptcy Code [§ 1129(a)(2)]; the plan be proposed in good faith [§ 1129(a)(3)]; payments made or to be made be approved by the bankruptcy court [§ 1129(a)(4)]; the plan meet the best interest test [§ 1129(a)(7)]; and, each impaired class must accept the plan [§ 1129(a)(8)]. Heartland claims that these requirements have not been met. A brief discussion follows with regard to each of them, except § 1129(a)(8). There is no question that each impaired class has not accepted the plan and that the plan

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[5]Findings of Fact and Conclusions of Law No. 31.

[6]Tr. Vol. V at 72.

[7]The bankruptcy court's determination, set forth in item 35, that the value of Heartland's secured claim is $8.2 million dollars is discussed infra.

is subject to the cramdown provisions of § 1129(b). See Findings No. 28.

1. Compliance with Applicable Code Provisions

Heartland argues that the plan fails to comply with § 1129(a)(1), because the plan is not feasible[8] and because the requirements of §§ 1123, 506(c), and 1125 have been violated. Heartland further asserts that the plan improperly classifies claims in an attempt to divest Heartland of the right to cast a vote based on its unsecured claim.[9] Heartland also maintains that debtor itself has failed to comply with applicable provisions of the Bankruptcy Code, in violation of 11 U.S.C. § 1129(a)(2).

Section 1123 sets forth the requirements for items to be included in reorganization plans. Pursuant to § 1123(a)(2), a plan must specify any class of claims or interests that is not impaired under the plan. In re Polytherm Indus., Inc., 33 B.R. 823, 829 (W.D. Wis. 1983). Although the better practice is to include a statement of whether each class of claims is impaired or unimpaired, all that is required is that there be a basis upon which a creditor can determine whether a class of claims is impaired. In re AG Consultants Grain Div., Inc., 77 B.R. 665, 670 (Bankr. N.D. Ind. 1987). In this case, one can easily determine from the plan which claims are

[8]See discussion of feasibility at pp. 17-20, supra.

[9]Although Heartland's opening brief devotes only one sentence to this issue, debtor's brief and Heartland's reply thereto discuss the issue at some length. Accordingly, the court considers that the issue is properly preserved.

unimpaired.

Section 1123(a)(3) requires that a plan specify the treatment of any class of claims that is impaired under the plan. This section means that if a plan provides for future cash payments, it must set forth the dollar amount of each payment and the date upon which it will be made. Sandy Ridge Dev. Corp. v. Louisiana Nat'l Bank (In re Sandy Ridge Dev. Corp.), 881 F.2d 1346, 1353 (5th Cir. 1989). The plan in this case does not contain the requisite specificity as to payments to be made.[10] Nor does the plan specify the terms of the note and deed of trust to be retained by Heartland.[11]

Section 1123(a)(4) requires that the plan provide the same treatment to each claim or interest of a particular class unless the holder of a particular claim agrees to less favorable treatment. Heartland complains that until January 22, 1991, the city was the only unsecured

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[10]For example, the plan provides that creditors will receive periodic cash payments at the discretion of the Regalridge trustees "but only to the extent that such payments do not effect the normal operations of the Property." Fourth Amended Plan of Reorganization at ¶ 6.2. In other words, creditors may or may not receive any such payments.

[11]Findings No. 16 addresses § 1123(a)(3), but states only that "Article 4 of the Plan describes the treatment to be afforded to each of the impaired classes." To the extent that this statement implies that the requirements of § 1123(a)(3) have been met, it is erroneous and must be set aside.

creditor entitled to select one of the three Regalridge trustees. The fact is, however, that the plan was amended to allow Heartland to select a trustee as well. No other unsecured claimants have complained of less favorable treatment and Heartland does not have standing to assert a complaint on their behalf in this regard. In re Orlando Investors, L.P., 103 B.R. 593, 597 (Bankr. E.D. Pa. 1989).

Section 1123(a)(5) requires that the plan provide adequate means for its implementation. This means that the debtor must offer more than speculation about the source of funding for the plan. In re Stuart Motel, Inc., 8 B.R. 48, 50 (Bankr. S.D. Fla. 1980). As previously discussed, debtor failed to provide information about its ability to refinance the property or sell it at a later date for a particular price. Debtor also failed to provide the note and deed of trust to be retained by Heartland. More importantly, debtor failed to show how the plan would be funded absent ninety percent economic occupancy, which had never before been achieved. For these reasons, the plan does not meet the requirements of § 1123(a)(5) and Findings No. 17 will be set aside.

Section 1123(a)(7) requires that the plan contain only provisions consistent with public policy and the interests of creditors and equity security holders regarding the manner of selection of any officer, director or trustee or their successors under the plan. Heartland complains because the plan calls for the selection of a trustee by the NAACP, which is not a creditor of debtor. The record reflects, however, that the NAACP has an interest in maintaining and preserving Regalridge. Heartland fails to show how the plan is inconsistent with, or adverse to, the interests of the public.

Heartland next complains that its cash collateral, that is, rents from the property, has been and will continue to be used to pay administrative expenses including professional fees incurred by debtor. Although cash collateral, e.g. rental income, may be used to pay ordinary and necessary operating expenses, it may not be used to pay administrative expenses or general costs of reorganization, except under extraordinary circumstances. French Market Homestead, F.S.A. v. P.C., Ltd. (In re P.C., Ltd.), 929 F.2d 203, 205 (5th Cir. 1991); New Orleans Pub. Serv., Inc. v. First Fed. Sav. & Loan Ass'n (In re Delta Towers Ltd.), 924 F.2d 74, 76 (5th Cir. 1991); In re Tripplet, 84 B.R. 84. 87 (Bankr. W.D. Tex. 1988). The exception is set forth in 11 U.S.C. § 506(c) and provides that the debtor must show that: (1) the expenditure is necessary; (2) the cost is reasonable; and (3) the expenses were incurred primarily for the benefit of the secured creditor and resulted in a quantifiable direct benefit to that creditor. In re P.C., Ltd., 929 F.2d at 205; General Elec. Credit Corp. v. Levin & Weintraub (In re Flaggstaff Foodservice Corp.), 739 F.2d 73, 75 (2nd Cir. 1984). The claim of an attorney rendering services to an estate is not entitled to priority over the claim of a secured creditor to its collateral. In re A.J. Lane & Co., 113 B.R. 821, 824 (Bankr. D. Mass. 1990). Therefore, to the extent the plan calls for the payment of debtor's attorney's fees or any other professional fees or extraordinary expenses out of Heartland's cash collateral, the plan violates § 506 (c).

Heartland additionally complains that the plan was improperly solicited, in violation of 11 U.S.C. § 1125, because debtor did not mail to creditors for their review a revised budgeted cash flow statement. Heartland maintains that the revised statement (Heartland's Exhibit 98) "substantially increased the expense projections beyond

what was described in the [third amended disclosure statement]" (Heartland's Exhibit 63). Heartland's Brief at 31. Heartland fails to mention that the revised statement also reflects a greater amount available for debt service. As debtor points out, a bankruptcy court may permit testimony at trial that varies from the information included in its disclosure statement, especially where that evidence indicates even stronger prospects for successful reorganization. Prudential Ins. Co. v. Monnier (In re Monnier Bros.), 755 F.2d 1336, 1342 (8th Cir. 1985).

Finally, on the subject of the plan's failure to comply with code provisions, Heartland complains that its unsecured claim, the City's unsecured claim, and the unsecured claims of debtor's trade creditors were improperly placed in separate classes in "an attempt to divest Heartland of its substantive right to cast a vote for its unsecured claim." Heartland Brief at 30-31. By placing the unsecured claims in separate classes, debtor made certain that at least one impaired class would vote to accept the plan, making a cramdown possible. See 11 U.S.C. § 1129(a)(10). Debtor attempts to justify its separate classification of the City's unsecured claim by noting that the claim was originally secured and now is not. Debtor does not offer, nor has the court found, any support for this position. Debtor additionally argues that its classification, if erroneous, constituted only a technical impropriety because all unsecured claims are treated the same way under the plan. The rule in the Fifth Circuit, however, is that substantially similarly claims should be placed in the same class and, further, that similar claims cannot be classified differently in order to gerrymander an affirmative vote on a reorganization plan. Phoenix Mutual Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture), 948 F.2d 134, 139 (5th Cir.

1992). As in Greystone, there is no support in the record for the bankruptcy court's conclusion that a reasonable basis exists for separate classifications of the unsecured claims. Thus, Findings Nos. 13 and 15 must be set aside.

Heartland also argues that debtor itself has failed to comply with the applicable Bankruptcy Code provisions, as evidenced by debtor's employment of, and payments to, professionals without prior court approval. Debtor replies that its later filing of motions for authorizations nunc pro tunc, which were approved, vitiates its earlier noncompliance with the Code. If that were all that was required, there would be no need for § 1129(a)(2).[12]

2. Good Faith

Heartland maintains that the plan was not proposed in good faith because there is not a reasonable likelihood that the plan will achieve a result consistent with the purposes and objectives of the Bankruptcy Code, i.e., the plan does not provide for expeditious resolution of disputes and speedy payment to creditors. See In re Madison Hotel Assoc., 749 F.2d 410, 424 (7th Cir. 1984); In re Hoosier Hi-Reach, Inc., 64 B.R. 34, 38 (Bankr. S.D. Ind. 1986). Whether a plan is proposed in good faith must be determined in light of the circumstances surrounding the plan. In re Texas Extrusion Corp., 844 F.2d 1142, 1160 (5th Cir.), cert. denied, 488 U.S. 926 (1988). In other words, objective, rather than subjective, intent of the debtor determines whether a plan is proposed in good faith.

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[12]The bankruptcy court did not make a specific finding or state a conclusion with regard to § 1129(a)(2).

The record does not support a finding of objective good faith, because the plan is not feasible. Moreover, despite the debtor's enthusiasm and the public's interest in maintaining Regalridge as a going concern, debtor's actions during the pendency of the bankruptcy call into question its subjective good faith. For example, debtor violated the bankruptcy court's order regarding the use of rents by knowingly making payments to professionals without prior court approval. Further, at the last minute, debtor filed a motion for approval of amendment to its fourth amended plan of reorganization, which amendment sought to change crucial definitions in the plan so as to enable debtor to consummate its plan pending Heartland's appeal to this court.[13] Accordingly, Findings No. 22 will be set aside.

3. Approval of Fees and Expenses

Next, Heartland complains that the plan calls for the payment of all fees and expenses to be within the discretion of the Regalridge trustees, who are not subject to court supervision. As debtor correctly notes, however, upon plan confirmation, a debtor is no longer a debtor in possession and the bankruptcy estate ceases to exist. In re NTG Indus., Inc., 118 B.R. 606, 610 (Bankr. N.D. Ill. 1990). In other words, the reorganized debtor is a new entity not subject to the jurisdiction of the bankruptcy

[13]Heartland notes that the motion was granted less than twenty-four hours after its filing. The record does not reflect whether debtor played any active role in presenting the motion for signature without notice to Heartland. The court has not considered the quick approval of the motion as any evidence with regard to debtor's good faith or lack thereof.

court, except as provided in the plan. Therefore, approval of fees for post-confirmation services is not required. Moreover, although 11 U.S.C. § 1129(a)(4) calls for approval of fees for preconfirmation services, Heartland does not contend that the fees for any such services have not been disclosed or that approval for payment of same will not be sought. The plan need not contain a specific provision mandating that all relevant payments be subject to court approval. In re Future Energy Corp., 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988).

4. Best Interest Test

Heartland claims that the plan fails to meet the best interest test, which requires that a dissenting creditor must receive on account of his claim property of a value, as of the effective date of the plan, that is not less than the amount the creditor would receive under a Chapter 7 liquidation. In re Elm Creek Joint Venture, 93 B.R. 105, 109 (Bankr. W.D. Tex. 1988). Debtor responds that Heartland will receive more on its unsecured claim under the plan than in a liquidation,[14] but the record does not support this contention. As previously stated, debtor made no showing that the property could or would be later sold for an amount sufficient to pay off Heartland's secured claim or to whom such sale would be made. Moreover, because the plan does not set forth the terms of the new

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[14]Debtor further states, echoing the bankruptcy court's statements in item 27 of the Findings, that all unsecured creditors are better off under the plan. The test, however, is not how the plan affects creditors in general, but rather whether the dissenting creditor will receive not less than the amount he would receive under Chapter 7 liquidation.

deed of trust to be executed in favor of Heartland, there is no assurance that Heartland's rights as a secured creditor will not be altered. Findings Nos. 26 and 27 must be set aside.

C. Whether the Plan Meets the Requirements for Cramdown

1. Fairness and Equity

To be confirmed over the objection of an impaired secured creditor, a plan of reorganization must not discriminate unfairly and must be fair and equitable with respect to the secured claim. 11 U.S.C. § 1129(b). "Fair and equitable" as used in the context of a cramdown means that, at a minimum, the secured creditor must receive the indubitable equivalent of his secured claim. In re Sandy Ridge Dev. Corp., 881 F.2d at 1349-50. In other words, mere technical compliance with § 1129(b)(2) does not assure that the reorganization plan is fair and equitable. Federal Sav. & Loan Ins. Corp. v. D&F Constr., Inc. (In re D&F Constr., Inc.), 865 F.2d 673, 675 (5th Cir. 1989). Rather, the court must consider the plan as a whole and all of the facts and circumstances surrounding treatment of the creditor's claim. Id.

The concept of indubitable equivalence was enunciated by Judge Learned Hand in In re Murel Holding Corp.:

> It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the

> difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior lienholders, unless by a substitute of the most indubitable equivalence.

75 F.2d 941, 942 (2nd Cir. 1935). The indubitable equivalence standard is stringent. In re Future Energy Corp., 83 B.R. 470, 496. Where a secured creditor receives neither his money nor the property upon which he has a lien, the debtor must show by clear and convincing evidence that the protection provided under the plan to the secured creditor is completely compensatory. In re Murel Holding Corp., 75 F.2d at 942; In re Future Energy Corp., 83 B.R. at 481.

In this case, the record does not support the bankruptcy court's finding that debtor met the strict requirements of § 1129(b)(2). The record does not contain evidence to support debtor's contention that Heartland will be paid in full, e.g. the record does not reflect, because debtor failed to show, what the value of Regalridge will be in fifteen years, that there is any prospect for the sale or refinancing of Regalridge, or who the purchaser or refinancer might be. Moreover, Heartland is not assured that it will retain the liens it now has. Despite debtor's assurance that it intended that the new deed of trust contain the same provisions as the old, no new deed of trust has ever been presented. The plan itself provides that Heartland's secured interest is unaffected except to the extent that it is contrary to the

letter and spirit of the plan, whatever that might mean.

2. The Absolute Priority Rule

The absolute priority rule provides that a dissenting class of unsecured creditors must be compensated in full before any junior class can receive or retain any property under a plan. 11 U.S.C. § 1129(b)(2)(C)(ii); Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988); Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939). Heartland maintains that the plan violates the absolute priority rule because (1) junior creditors will receive payment before Heartland's secured claim is paid in full and (2) its secured claim is not properly valued.

Heartland's first point is well taken. As discussed in the immediately preceding section of this opinion, the record does not reflect that Heartland will receive the indubitable equivalent of its secured claim. In other words, Heartland's claim may not be paid in full. The plan nevertheless calls for payments to junior lienholders before senior claims are paid. The fact that Heartland also has an unsecured claim does not change the requirements of the absolute priority rule.[15]

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[15]In support of its first argument, Heartland additionally points to the fact that debtor selected the persons who would select the Regalridge trustees, and further, the fact that a management company owned by debtor's general partner would qualify to be appointed by the Regalridge trustees to manage Regalridge. Heartland fails to show how either of these facts is relevant. The record does not reflect that debtor will have any control over the Regalridge trustees or that any entity affiliated

As for the issue of valuation of Heartland's secured claim, Heartland fails to explain why such valuation is relevant to the absolute priority rule, which addresses only the treatment of unsecured claims.[16] Relevancy, vel non, Heartland fails to show that the bankruptcy court erred in determining the amount of Heartland's secured claim. The value a secured creditor is entitled to receive and must receive is the value accorded to a buyer in an arm's length transaction, that is, the going concern value of the property. Lakeside Global, 116 B.R. at 513. See also Overholt v. Farm Credit Servs. (In re Overholt), 125 B.R. 202, 215 (S.D. Ohio 1990). Tax liens and the cost of necessary repairs must be subtracted to determine the fair market value of the property, i.e. the allowed secured claim. In re Groff, 131 B.R. 703, 707 (Bankr. E.D. Wis. 1991); Beacon Hill Apartments Ltd. v. Columbia Sav. & Loan Ass'n (In re Beacon Hill Apartments Ltd.), 118 B.R. 148, 149 (N.D. Ga. 1990); Wolk v. Goldome Realty Credit Corp. (In re 222 Liberty Assocs.), 105 B.R. 798, 801 (Bankr. E.D. Pa. 1989).

For the reasons discussed in this section VII, Findings Nos. 41, 42, and 43 must be set aside.

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with debtor will be appointed to manage the property. Heartland further states that the plan provides, and the disclosure statement indicates, that "interest holders" of debtor are to be discharged upon plan confirmation. Heartland's brief at 40. The plain language of the plan and disclosure statement does not support this contention.

[16]Valuation of collateral would seem to be an issue more appropriately addressed in the context of feasibility or fairness and equity.

VIII.
Orders Nunc Pro Tunc

Heartland maintains that the bankruptcy court erred in granting nunc pro tunc debtor's applications for authority to employ an appraiser, an architect, and a marketing consultant. The record reflects that the appraiser was retained by debtor in the summer of 1990 and paid a $4,000.00 retainer; the architect was retained in April 1990 and as of the confirmation hearing had received compensation of almost $25,000.00; the marketing consultant had been retained in August 1990 and had been paid approximately $23,000.00 at the time of the hearing. In December 1990, debtor moved for the retroactive approval of its hiring of these professionals. At the hearing on its applications, debtor admitted that the failure to seek prior approval was "merely an oversight" and something that "fell through the cracks." Tr. Vol. I, 10-12.

The Bankruptcy Code and rules contain specific requirements for the retention and compensation of professionals. See Bankruptcy Code §§ 327 and 330; Bankr. R. 2014 and 2016. Courts in this Circuit require strict adherence to these provisions. See, e.g., In re Consolidated Bancshares, Inc., 785 F.2d at 1254 & n.3. Moreover, nunc pro tunc applications are not to be granted except where there are exceptional circumstances. Fanelli v. Hensley (In re Triangle Chemicals, Inc.), 697 F.2d 1280, 1289 (5th Cir. 1983). Mere oversight in filing a timely application is not an extraordinary circumstance that warrants nunc pro tunc approval. In re Aladdin Petroleum Co., 85 B.R. 738, 739 (Bankr. W.D. Tex. 1988). The bankruptcy court did not find that rare or exceptional circumstances existed nor would the record have supported such a finding. Accordingly, the court finds that the orders

nunc pro tunc approving the employment of professionals must be set aside.

IX.
Denial of Heartland's Administrative Claim

On or about January 3, 1991, Heartland filed its motion to allow administrative claim. The motion recited that, since January 18, 1990, when the bankruptcy court entered an order for use of rents, debtor had paid for all of its operations with Heartland's cash collateral. Heartland alleged that debtor had expended at least $2,193,334.14 as of September 30, 1990, and that Heartland was entitled, pursuant to 11 U.S.C. § 503(b)(1)(A), to recover as an administrative expense that amount plus whatever amounts had been subsequently expended by debtor for preserving and managing the bankruptcy estate.

Debtor filed an objection to the motion, pointing out that Heartland's reading of the Code was absurd and that Heartland was not entitled to an administrative claim except under 11 U.S.C. § 507(b) if its collateral declined in value during the pendency of the bankruptcy. Heartland responded by completely altering its prior position and asserting that it was entitled to an administrative claim for every expense incurred by debtor that debtor could not prove was reasonable and necessary and incurred for Heartland's benefit. The bankruptcy court considered the motion at a hearing on January 23, 1991, and denied the relief sought by order signed January 24, 1991.

Heartland includes among its issues on appeal, almost as an afterthought, that the bankruptcy court erred in denying its motion for administrative claim. Although

none too clear, Heartland's complaint appears to be that debtor was only entitled to use Heartland's cash collateral if debtor could meet the test of 11 U.S.C. § 506(c).[17] Heartland maintains that debtor could not meet the test with regard to its expenditure of at least $284,000.00,[18] and that, therefore, Heartland should have been granted an administrative claim of that amount.

Case law support debtor's, rather than Heartland's interpretation of the Code. In a Chapter 11 case, a debtor in possession has a statutory right to use encumbered assets to operate its business. In re Provincetown-Boston Airline, Inc., 66 B.R. 632, 634 (Bankr. M.D. Fla. 1986). Indeed, most real property reorganizations would fail if the debtor could not use the income stream generated by the property. In re Fry Road Assocs., Ltd., 66 B.R. 602, 604-05 (Bankr. W.D. Tex 1986). The right to use collateral necessary to reorganization may not be taken away unless the secured creditor can demonstrate that it cannot otherwise be adequately protected. In re Provincetown-Boston Airline, Inc., 66 B.R. at 634. In that event, the remedy available to the secured creditor is not through § 503(b), but rather through § 507(b). First State Bank v.

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[17]Appellant further asserts that, "under general principles of subrogation", it "stands in the shoes of those administrative claimants who received its cash collateral." Appellant's brief at 52. The court is unable to comprehend this argument.

[18]The court is unclear as to whether this amount is supported by the record. Appellant cites its own statement of facts in support of this figure, although the amounts recited therein total only $84,971.00.

Advisory Information and Management Systems, Inc. (In re Advisory Information and Management Systems, Inc.), 50 B.R. 627, 629 (Bankr. M.D. Tenn. 1985).

The purpose of § 503(b) is to encourage third parties to provide goods and services necessary for successful reorganization. In re Jartran, Inc., 732 F.2d 584, 588 (7th Cir. 1984). The Code and case law simply do not support any argument that § 503 was intended as an optional remedy to adequate protection provided by § 361. In re Provincetown-Boston Airline, Inc., 66 B.R. at 634. As one court has stated, "the secured creditor is not contributing to the estate by allowing a debtor in possession to use collateral which it already owns and has a statutory right to use." Id.

X.
Deposit of Consideration

The final section of Heartland's appeal brief addresses the bankruptcy court's failure to require the deposit of monies to be distributed upon plan confirmation into a special account. Heartland maintains that the special account is necessary to assure that funds generated from the operation of Regalridge not be used to pay the claims of junior creditors. Heartland asserts that the denial of its motion constituted an abuse of discretion, but cites no authority in support of this proposition. The court is unable to find that the bankruptcy judge abused his discretion in this regard.

XI.
Further Proceedings

There does not appear to be a reasonable likelihood that a confirmable plan could be proposed under the facts of this case. Accordingly, there is no reason why the automatic stay should not be lifted to allow Heartland to foreclose its liens in the property. Further, orders should be made by the bankruptcy court to cause the estate to be reimbursed for any payments it has made to the appraiser, the architectural design and supervision company, and the marketing agent as authorized by the bankruptcy court.

XII.
ORDER

For the reasons set forth herein,

The court ORDERS that:

1. The bankruptcy court's findings of fact and conclusions of law Nos. 12, 13, 15, 17, 22, 26, 27, 31, 36, 37, 38, 41, 42 and 43 be, and are hereby, set aside;

2. The bankruptcy court's orders (a) confirming debtor's fourth amended plan of reorganization, (b) employing and retaining James W. Daniels & Associates, Inc., as appraiser, and (c) employing and retaining John R. Horton, Inc., as architectural design and supervision company, and the ruling of the bankruptcy judge approving the employment of the marketing agent, nunc pro tunc, be, and are hereby, REVERSED; and

The consolidated actions be, and are hereby, remanded for further proceedings consistent with this memorandum opinion and order.

SIGNED April 14, 1992.

s/John McBryde
JOHN MCBRYDE
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
Briscoe Enterprises, Ltd.	§	Case No.
II, d/b/a Regalridge Square	§	
Apartments,	§	489-44447-MT-11
	§	
Debtor.	§	

ORDER CONFIRMING DEBTOR'S FOURTH AMENDED PLAN OF REORGANIZATION

In conformity with the Findings of Fact and Conclusions of Law entered by this Court in the above styled and numbered bankruptcy proceeding on this date, it is

ORDERED, ADJUDGED AND DECREED that Heartland's Motion to Convert or Dismiss this case be and is hereby DENIED without prejudice.

IT IS FURTHER ORDERED that the Plan proponent's request to confirm the Plan is GRANTED.

IT IS FURTHER ORDERED that the Objection by Heartland and any specific objection not already addressed explicitly or implicitly by the Court's Findings of Fact and Conclusions of Law are OVERRULED.

IT IS FURTHER ORDERED that the Plan be and hereby is CONFIRMED.

IT IS FURTHER ORDERED that all further relief not expressly granted herein be, and it is hereby DENIED.

IT IS SO ORDERED.

SIGNED: April 23, 1991

s/Massie Tillman
Honorable Massie Tillman
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	
Briscoe Enterprises, Ltd.	§	Case No.
II, d/b/a Regalridge Square	§	
Apartments,	§	489-44447-MT-11
	§	
Debtor.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At Fort Worth, Texas, in said District:

Debtor, Briscoe Enterprises, Ltd., II, d/b/a Regalridge Square Apartments ("Briscoe"), filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on the 29th day of December, 1989.

On the 23rd day of January, 1991, the Court commenced a hearing on Confirmation of the Debtor's Fourth Amended Plan of Reorganization, continuing on the 24th, 25th and 28th day of January, 1991 and concluding on the 18th day of March, 1991, in the above-styled and numbered bankruptcy case.

Debtor appeared by and through its counsel of record, Weil, Gotshal & Manges. Heartland Federal Savings and Loan ("Heartland"), the only party objecting to confirmation of the Plan of Reorganization, appeared by and through its counsel of record, Gardere & Wynne.

Pursuant to the Court's oral ruling, confirming Debtor's Fourth Amended Plan of Reorganization and after hearing the testimony and evidence presented and reviewing the pleadings, legal memoranda, written arguments of counsel, and legal precedent relevant to the dispute, this Court makes the following additional Findings of fact and Conclusions of Law:

Background

1. On December 29, 1989, Briscoe Enterprises, Ltd. II (the "Debtor") filed a voluntary petition under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

2. The Debtor's principal asset is a 784-unit low to moderate income property more commonly known as the Regalridge Square Apartments (the "Property"). The Property is located at 4500 Campus Drive, Fort Worth, Texas.

3. Heartland holds an undisputed first lien on the real property comprising the Property pursuant to (a) a Deed of Trust, Assignment of Rents and Security Agreement dated January 31, 1984, which Deed of Trust is recorded in Volume 7731, Page 1534, et. seq. of the Deed of Trust Records of Tarrant County, Texas, and (b) that certain Deed of Trust, Assignment of Rents and Security Agreement dated April 11, 1983, which Deed of Trust is recorded in Volume 7486, Page 2280, et. seq. of the Deed of Trust Records of Tarrant County, Texas. The amount owed to Heartland by the Debtor exceeds the value of the Property. As a result, Heartland is undersecured and holds a substantial unsecured claim against the Debtor. Additionally, because of the value of

the Property and the amounts owed to Heartland, a second lien exceeding $7 million on the Property in favor of the City of Fort Worth also has become a substantial unsecured claim.[1] Because of the lapse of Heartland's UCC-1 Financing Statement, the Debtor has sought to avoid Heartland's lien in and to the personalty, which partially comprises the Property. This Court entered an order denying the Debtor's avoidance action and that issue is currently on appeal to the District Court. The Disposition of that appeal is not relevant to whether the Plan should be confirmed.

4. In June, 1990, Debtor filed its Plan of Reorganization. Thereafter, Debtor's initial bankruptcy counsel was disqualified from further representation of the Debtor in this case. A motion to dismiss or convert this case to a case under Chapter 7 was filed by Heartland. If the case were dismissed or converted, one possible outcome would be Heartland obtaining ownership of the Property through foreclosure.

5. Debtor subsequently retained substitute counsel and thereafter, on November 16, 1990, filed its First Amended Plan of Reorganization, which was later modified by the filing of the Debtor's (a) Second Amended Plan of Reorganization on December 12, 1990, (b) Third Amended Plan of Reorganization on December 20, 1990, and (c) Fourth Amended Plan of Reorganization on January 22, 1991. The Fourth Amended Plan of Reorganization (the "Plan") was the Plan of

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[1]The City of Fort Worth is also the holder of an ad valorem tax claim which is separate and distinct from its $7 million undersecured claim.

Reorganization ultimately presented to the Court for confirmation.

6. On November 16, 1990, the Debtor filed its First Amended Disclosure Statement, which was later modified by the filing of the Debtor's (a) Second Amended Disclosure Statement on December 12, 1990, and (b) Third Amended Disclosure Statement on December 20, 1990. The Third Amended Disclosure Statement (the "Disclosure Statement") was approved by the Court on December 21, 1990, as containing adequate information as required by 11 U.S.C. §1125.

7. The deadline established by the Order for voting on the Plan was January 18, 1991. On January 14, 1991, Heartland filed its objection to the Plan (the "Objection"). No other creditor filed an objection to the Plan. All other creditors and classes allowed to vote on the Plan voted to accept the Plan. Heartland, the Class 4 creditor, voted to reject the Plan, both in its secured and unsecured capacity. The Debtor and Heartland each filed their respective memoranda in support of and in opposition to the Plan.

8. On January 23, 1991, the Court began the confirmation hearing on the Debtor's Plan and Heartland's Motion to Convert or Dismiss. The confirmation hearing continued over a period of five days on January 23, 24, 25 and 28, and March 14, 1991. Closing arguments were made by the parties at the close of the confirmation hearing on March 14, 1991.

9. Upon consideration of the Plan and the Objection filed by Heartland, and the Court having considered and admitted into evidence for purposes of the

confirmation hearing, the documents identified in the exhibit lists filed by the Debtor and Heartland, together with the pleadings and other papers filed in this case, and the evidence and arguments of counsel having been presented to this Court, in accordance with Bankruptcy Rules 7052 and 9014, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

10. This Court has jurisdiction over this case. Confirmation of the Plan and Heartland's Motion to Convert or Dismiss are "core" matters. 11 U.S.C. § 1129; 28 U.S.C. § 157(b)(1), § 157(b)(2)(A), (L), (O), and § 1334.

11. The modifications to the Plan, which were included in the Plan after voting thereon, but prior to confirmation, do not adversely change the treatment of the claim of any creditor of the Debtor. See Bankruptcy Rule 3018.

Section 1129(a)(1)

12. The Plan complies with the applicable provisions of the Bankruptcy Code.

13. Article 3 of the Plan designates six (6) separate classes of claims and interests. 11 U.S.C. § 1123(a)(1). The claims and interests in each class are based upon separate and distinct legal natures. Therefore, a reasonable basis exists for separate classifications of these claims and interests. The claims and interests in each class under the Plan are substantially similar and their classification satisfies the requirements of § 1122(a)

of the Bankruptcy Code.

14. Heartland objected to the Plan on the grounds that the Plan did not specify whether the Administrative Claims or the Priority Claims are impaired. Such a designation with respect to Administrative Claims and Priority Claims is unnecessary. Pursuant to 11 U.S.C. § 1129(a)(9) of the Bankruptcy Code, the Administrative Claims and Priority Claims cannot be impaired. The class of interest holders is also not specified as unimpaired. Such a designation is meaningless because the interest holders did not receive or retain any property under the Plan and, hence, are deemed not to have accepted the Plan. 11 U.S.C. §1126(g).

15. Heartland also objected to the Plan on the grounds that both its deficiency claim and its secured claim were included in one class. If Heartland had made an election under §1111(b) election, its unsecured claim should technically have been classified separately from its secured claim. The Court accepted the Plan which provided for separate classification of Heartland's secured and unsecured claims. Heartland's secured claim will receive the treatment provided in Class 4 while its unsecured claim will receive the same treatment as provided in Class 5. Two unsecured classes of non-insider creditors voted to accept the Plan; thus, the control of two classes by Heartland effectuates a non-substantive and technical amendment to the Plan. The Court recognizes the "well established principle that relief under bankruptcy laws is not to be withheld because of technicalities." Kane v. Johns-Manville, (In re Johns-Manville), 843 F.2d 636, 648 (2nd Cir. 1988) (cite omitted). Heartland's objections to confirmation of the Plan based on technical issues relating to classification are overruled.

16. Article 4 of the Plan describes the treatment to be afforded to each of the impaired classes. 11 U.S.C. § 1123(a)(3).

17. Article 5 of the Plan provides adequate means for execution and implementation of the Plan. 11 U.S.C. § 1123(a)(5). Section 5.2 of the Plan provides that at closing, the Regalridge Trust will be established for the purposes of owning, managing, and operating the Property. The property will be transferred to the Regalridge Trust upon the effective date. The Plan further provides that all interests in the Debtor will be deemed cancelled.

18. The Plan further provides that on the effective date, the Regalridge Trust will be executed by the Debtor and the Regalridge Trustees. The Plan provides for the appointment of three (3) Regalridge Trustees to hold and manage the Property. The Regalridge Trustees will be appointed one each by the City of Fort Worth, the Fort Worth NAACP, and Heartland. The third Regalridge Trustee will be appointed by Heartland. The Plan also specifies the minimum qualifications for the Regalridge Trustees. Each Regalridge Trustee must be (a) a resident of the City of Fort Worth; (b) at least 35 years of age; (c) uninvolved in any business or partnership with Leonard E. Briscoe, Sr. or the Debtor; and (d) unrelated to and not a close personal friend of Leonard E. Briscoe, Sr. The Plan further provides that the Regalridge Trustees will receive no compensation for their services but may receive reimbursement of their actual and necessary expenses incurred in carrying out their responsibilities under the Trust. In addition, the Regalridge Trustees will serve without bond. The Court finds that the provisions of the Plan regarding the selection of the Regalridge Trustees are consistent with the interest of creditors and with public

policy.

19. The Plan provides for the distribution to creditors on a pro rata basis of the cash flow on at least an annual basis.

20. The Plan provides for the transfer of the Property to the Regalridge Trust, which is not a corporation. Thus, § 1123(a)(6), made applicable to this case by § 1129(a)(1), is not applicable.

21. The manner and selection of the Regalridge Trustees is consistent with the interests of creditors and with public policy. The Debtor has disclosed the identity and affiliation of the Regalridge Trustees who have been appointed by the Fort Worth NAACP and the City of Fort Worth. The appointment and qualifications of the Regalridge Trustees are consistent with the interests of creditors and public policy.

Section 1129(a)(3)

22. The Plan has been proposed in good faith and not by any means forbidden by law. 11 U.S.C. §1129(a)(3). In order to determine whether a plan has been proposed in good faith, the Court must look to the totality of the circumstances surrounding the formation of the Plan. In re Texas Extrusion Corp., 844 F.2d 1142, 1160 (5th Cir.), cert. denied, 488 U.S. 926 (1988). A plan proposed with a legitimate and honest purposes, and which has a reasonable hope of success, satisfies the good faith requirement. In re Sun Country Dev., Inc., 764 F.2d at 408 (5th Cir. 1985). The Plan provides a vehicle for restructuring the debt of the Property and preserving the Property for the benefit of both creditors and the Fort

Worth community. Moreover, none of the interest holders of the Debtor will retain anything under the Plan. Consequently, the Plan has been proposed in good faith and not by any means forbidden by law.

Section 1129(a)(4)

23. Section 1129(a)(4) requires that payments for services or for costs and expenses in and in connection with the case, or in connection with the Plan and incident to the case, either have been approved by the Court as reasonable or are subject to approval of the Court as reasonable. Interim payments remain subject to review and approval by this Court on final application. The Plan provides that any other payments falling within the parameters of § 1129(a)(4) will not be made without Court approval.

Section 1129(a)(5)

24. Section 1129(a)(5) requires the Debtor to disclose the identity of certain individuals who will hold positions with the Debtor or its successor after confirmation of the Plan. The Debtor will not retain any interest in the Property after confirmation. Instead, Regalridge Trustees will be appointed to administer the Regalridge Trust which will own and hold the Property. The appointment of the Regalridge Trustees pursuant to the provisions of the Plan and as discussed herein is consistent with the interests of creditors and public policy.

Section 1129(a)(6)

25. There are no rates applicable to the Debtor's business over which any regulatory commission

will have jurisdiction after confirmation. 11 U.S.C. § 1129(a)(6).

Section 1129(a)(7)

26. The Plan satisfies the requirements of §1129(a)(7), the best interests of creditors test. Under the Plan, Classes 3, 4 and 5 are impaired. With respect to Classes 3 and 5, each voting holder of a claim in such class will receive or retain under the Plan on account of the claim property of a value, as of the effective date, that is not less than the amount that each holder would receive or retain if the Debtor were instead liquidated under Chapter 7 of the Bankruptcy Code on the effective date or has accepted the Plan.

27. With respect to satisfaction of §1129(a)(7) regarding the claims of Heartland, the Debtor presented evidence to the Court which shows that the Property will probably support debt service equal to Heartland's secured claim of $8.2 million. In other words, Heartland will receive the present value of its secured claim. In addition, the Court finds, based on the evidence presented, that over the next six years, money will be available as cash flow for distribution to creditors whose claims will be treated as unsecured Class 5 claims after payment of ordinary and necessary operating expenses and payment of debt service on Heartland's secured claim. The unsecured deficiency claim of Heartland, which is approximately $10 million, will receive the same treatment provided for Class 5 claims. The Debtor provided additional evidence which showed that in the event of liquidation in a Chapter 7 case, only the priority claim of the City of Fort Worth and the secured claim of Heartland (Classes 2 and 4, respectively) would receive any consideration.

Consequently, in a Chapter 7 liquidation case, no amounts would be available for distribution to creditors whose claims are treated as unsecured Class 5 claims under the Plan.

Section 1129(a)(8)

28. Section 1129(a)(8) requires that each impaired class of claims or interests have accepted the Plan. The City of Fort Worth timely file a ballot to accept the Plan based upon its Class 2 claim. The Court finds that based on Ballots filed with this Court, the City of Fort Worth voted its impaired Class 3 claim to accept the Plan. The unsecured Class 3 claim of the City of Fort Worth exceeds $7 million. The Court also finds that: (i) six Class 5 creditors also timely filed ballots to accept the Plan; (ii) five additional Class 5 creditors voted to accept the Plan, but such ballots were received after the deadline for filing the ballots; and (iii) no Class 5 creditors voted against the Plan. After considering the evidence presented, the Court finds that based upon the timely filed Ballots by Class 3 and Class 5 creditors, such claims are sufficient in number and amount to constitute acceptance by such classes of the Plan pursuant to 11 U.S.C. §1126. Because both the unsecured and secured claims of Heartland voted to reject the Plan, the Plan does not satisfy the requirements of §1129(a)(8). The holders of interests in Class 6 will neither receive nor retain property under the Plan, and therefore, are deemed to have rejected the Plan. 11 U.S.C. §1126(g).

Section 1129(a)(9)

29. Section 1129(a)(9) contains a number of requirements concerning the payment of priority claims.

The Plan meets the requirements of two subsections of Section 1129(a)(9) by providing for payment in full of priority claims in cash on or before the later of the effective date of the Plan and the date a priority claim is allowed.

Section 1129(a)(10)

30. The holders of claims in at least one impaired class under the Plan have accepted the Plan, determined without including any acceptance of the Plan by an insider of the Debtor which holds a claim in that class. In this case, Class 3, an impaired class, has voted to accept the Plan. None of the creditors in Class 3 are insiders within the meaning of §1129(a)(10).

Section 1129(a)(11)

31. The Plan is feasible and has a marginal prospect of success. The reorganized Debtor is capable of performing under the Plan and confirmation will not likely be followed by the need for further financial reorganization or liquidation of the Debtor or its successor except to the extent that the Plan provides for liquidation and reorganization.

32. The Plan contemplates the use of operating revenue for the success of the Plan. In order to determine whether the Plan is feasible, the Court is required to determine (a) the value of Heartland's secured claims; and (b) the likelihood that the Property can generate sufficient cash flow to pay its ordinary and necessary operating expenses, meet debt service and produce a surplus for distribution to creditors.

33. Section 506(a) of the Bankruptcy Code provides that an allowed claim of a creditor secured by a lien on property in which the estate has an interest is secured to the extent of the value of that creditor's interest in such property and is an unsecured claim to the extent that the value of the creditor's interest is less than the amount of its allowed claim. The value of the creditor's secured claim is to be determined in light of the purpose of the valuation and the proposed disposition of the Property.

34. In the instant case, the Debtor has approximately $750,000 in pre-petition ad valorem taxes which upon sale or other disposition of the Property would be paid before Heartland's secured claim. In addition, the Debtor presented evidence that approximately $250,000 to $300,000 is needed to make repairs on the Property.

35. The Debtor presented evidence by its appraiser, James Daniels, MAI, that the value of the Property is $9.2 million, if the taxes are paid and if the needed repairs have been made. The Court finds Mr. Daniels' testimony credible and convincing, and therefore, finds that the value of the Property, as is, that is after taking into consideration the $750,000 tax lien held by the City of Fort Worth that will not be paid in full at confirmation, and after making a deduction for repairs, is $8.2 million. See Transcript of Hearing, pp. 38-55. The Court finds that the value of Heartland's secured claim is $8.2 million.

36. The Debtor's financial projections showed that with income of $200,000 per month, the Property will generate sufficient cash flow to pay: (i) necessary and normal operating expenses; (ii) the secured debt of

Heartland at a market rate of interest; and (iii) a dividend to creditors whose claims are treated as Class 5 claims on at least an annual basis. The Debtor's evidence further showed that for the past several months, the Debtor has met or exceeded the $200,000 per month income that will be needed to fund the Plan. The evidence further showed that occupancy at the Property has increased from approximately 55% at the commencement of the case to its current level of 85%. The Debtor presented further evidence that occupancy at the Property will probably increase to approximately 90% within the first half of this year. The Court accepts the Debtor's projections but cautions that the Debtor will have to work diligently to make this Plan succeed.

37. The Debtor also has demonstrated its ability to make the needed repairs on the Property. Prior to the continuation of the confirmation hearing on March 14, 1991, counsel for the Debtor and Heartland announced to the Court a resolution of the adversary proceeding filed by the Debtor against Heartland for turnover of certain insurance proceeds in order to make the repairs on the Property. Pursuant to the agreement reached by the parties, Heartland has consented to the Debtor's use of approximately $225,000 of insurance proceeds not only to make repairs on the Property that are covered by the insurance proceeds but also to use any excess insurance proceeds to make additional repairs on the Property. While some of the repairs are urgent in nature, the Debtor presented testimony that some of the repairs could be delayed throughout the remainder of the year and that such deferred repairs could be paid for from cash flow that will be available by the end of the year.

38. Based on the evidence presented herein, the Court finds that the Plan is not likely to be followed by the need for further financial reorganization or liquidation and is feasible.

Section 1129(a)(12)

39. All fees payable under 28 U.S.C. § 1930, and determined by the Court at the confirmation hearing, have been paid or the Plan provides for such payment.

Section 1129(a)(13)

40. The Debtor has no retiree plans, funds, or programs that provide for the payment of retiree benefits as defined in § 1141 of the Bankruptcy Code.

Section 1129(b)

41. Heartland voted its secured and unsecured claims to reject the Plan. Notwithstanding such rejection, the Plan may be confirmed pursuant to § 1129(b) of the Bankruptcy Code because the Plan satisfies the requirements of § 1129(a) except subparagraph (a)(8), does not discriminate unfairly against Heartland, and is fair and equitable.

42. The Plan is fair and equitable to Heartland because Heartland will retain the lien securing its claim and will receive on account of its claims deferred cash payments totaling at least the allowed amount of its claim of a value, as of the effective date of at least the value of Heartland's interest in the Property. The Plan provides that Heartland's secured claim will be paid in monthly

installments of principal and interest as though amortized over thirty years. Interest on the secured claim will be paid at the rate of ten and one-quarter percent (10.25%) per annum which is the same rate of interest included in the January 31, 1984 promissory note from the Debtor to Heartland (or its Predecessor). The outstanding principal balance of Heartland's secured claim will be paid on the earlier date of the sale of the Property or the expiration of fifteen (15) years after the effective date. Based upon the evidence presented at the confirmation hearing, the Court finds that the rate of interest to be paid to Heartland on account of its secured claim together with the scheduled amortizing payments of principal to be made pursuant to the Plan will provide Heartland with payments totalling the present value of its secured claim.

43. Moreover, the treatment of Heartland's deficiency claim in Class 5 is identical to the treatment of all creditors whose claims are being treated in Class 5. Thus, the Plan protects the legal rights of Heartland's unsecured deficiency claim consistent with the treatment afforded to the accepting unsecured Class 3 and Class 5 claims. The Plan also is fair and equitable to the unsecured and secured claims of Heartland because no holder of any claim or interest junior to Heartland's claims under the Plan will receive or retain on account of the junior claim or interest any property under the Plan. In addition, implicit in the fair and equitable standard of §1129(b) is the requirement that single claims not receive a recovery greater than 100% of their claims, based on the evaluation of distribution at the time of the confirmation hearing. No class of holders of claims that are senior to the Class 4 claim under the Plan will receive distribution having the value determined as of the time of the confirmation hearing in excess of the allowed amount of

such holder's claim.

SUMMARY

Based upon the foregoing Findings of Fact and Conclusions of Law, it is appropriate for this Court to CONFIRM Debtor's Fourth Amended Plan of Reorganization, Overrule Heartland's Objections to such Plan and Deny Heartland's Motion to Dismiss or Convert.

All further relief not expressly granted herein is denied.

This Court shall enter an Order in conformity with the Findings of Fact and Conclusions of Law entered this date.

IT IS SO ORDERED.

SIGNED: April 23, 1991

s/Massie Tillman
Honorable Massie Tillman
United States Bankruptcy Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1446

In re: Briscoe Enterprises, Ltd., II,
d/b/a Regalridge Apartments,

Debtor.

Heartland Federal Savings & Loan Association,

Appellee,

vs.

Briscoe Enterprises, Ltd., II,
d/b/a Regalridge Apartments,

Appellant.

On Petition for Rehearing and Suggestion
for Rehearing En Banc

Before Wisdom and Duhe', Circuit Judges, and Doherty*, District Judge.

*District Judge of the Western District of Louisiana, sitting by designation.

Per curiam:

The petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

Entered for the Court:
s/John Minor Wisdom
United States Circuit Judge
August 16, 1993

Judges Barksdale, King and Jones did not participate in the consideration of the suggestion for rehearing en banc.

* * * * * * * * * *

Respectfully submitted,

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